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UNINSURED MOTORIST LAW IN OKLAHOMA

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I bow to no one in my inability, at times, to understand the convoluted language of insurance contracts; nor do I take a back seat to anyone in my inability, at times, to resolve conflicting interpretations. My search for reasoning in the development and application of insurance law however has never been so tortured as now—when I find myself immersed in the not so tranquil sea of uninsured motorist coverage. The endless cases reveal only one universal truth—uninsured motorist coverage is filled with algorithms, which often extend no further than the cases which gave birth to their existence.

The coverage termed “uninsured motorist coverage” is surely one of the most remarkable contractual undertakings ever devised, for uninsured motorist coverage does *not* insure uninsured motorists, (third parties); nor does it insure vehicles; rather, *uninsured motorist coverage affords first-party coverage to person(s)* for whom the insurance contract is being written. It, thus, matches the complexity of the underlying policy and

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affords benefits on account of a wide variety of losses¹

Uninsured motorist coverage disputes have "been treated to definitions, principles and rules almost as varied as the fact-patterns presented to the courts of the several states, but without the emergence of a single, consistent line of reasoning which can serve as a guideline in the determination of subsequent, similar cases."² This is so because uninsured motorist jurisprudence is rooted in the abstract paradigm of public policy: a paradigm ill-suited to predictability, certainty, and uniformity in logic and reasoning.

This article surveys the uninsured motorist law of Oklahoma. Its objective is to catalog the prevailing rules, principles, and analytical standards used in Oklahoma to resolve uninsured motorist coverage disputes. The survey starts from the broad perspective of identifying and discussing doctrines and principles that are widely accepted as foundational components of uninsured motorist law interpretation. Thus, section I examines the principle of portability and the gap theory. It further explains the logic and reasoning which underlie these concepts and demonstrates that unity of purpose does not always equal unity of application. Finally, section I explains how the gap theory has led to the classification of uninsured motorist statutes as either minimum liability or full recovery.

Section II examines the foundational requirements that must be proven in order to recover uninsured motorist proceeds in Oklahoma. This section explains the distinct role each prerequisite plays in the overall coverage dispute. Although the organizational scheme of section II segregates and focuses on the individual considerations of each requirement, it is misleading to view the underlying requirements as discrete. As demonstrated in section II, none of the requirements can really be defined except by reference to the others.

Section III discusses the obligations and rights of the uninsured motorist carrier. It examines the insurer's duty to investigate, evaluate, negotiate, and pay the claim. Section III also explores the insurer's right of subrogation against the uninsured motorist. As demonstrated by the discussion in section III, the obligations owed by the insurer to its insured are absolute, in that they may not be varied by contract or breached. The insurer's right of subrogation, however, is conditional and

1. *Silver v. Slusher*, 770 P.2d 878, 885 (Okla. 1988) (Wilson, J., dissenting).

2. *Porter v. Empire Fire & Marine Ins. Co.*, 475 P.2d 258, 261 (Ariz. 1970).

is subject to the principles of breach of contract, waiver, and estoppel. Likewise, the insurer's right to intervene may be conditioned to avoid prejudice.

I. FOUNDATIONAL CONCEPTS AND PRINCIPLES

All states, except Michigan,³ have statutes making it mandatory for uninsured motorist coverage to either be offered for purchase subject to rejection,⁴ or actually provided.⁵ One purpose of uninsured motorist

3. Michigan enacted the Motor Vehicles Accident Claims Act, MCLS § 257.1106, to serve the purpose of uninsured motorist coverage. MICH. COMP. LAWS ANN. § 257.1106 (West 2001). See *Bradley v. Mid-Century Ins. Co.*, 294 N.W.2d 141 (Mich. 1980); see also *No-Fault Automobile Provisions*, MICH. COMP. LAWS ANN. § 500.3177 (West 2002). Rights afforded by uninsured motorist coverage are purely contractual. *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23 (Mich. 2005).

4. ALA. CODE § 32-7-23 (LexisNexis 1999); ALASKA STAT. § 28.20.440(b)(3) (2008); ARIZ. REV. STAT. ANN. § 20-259.01(A) (Supp. 2008); ARK. CODE ANN. §§ 23-89-403, 404 (2004 & Supp. 2007); CAL. INS. CODE § 11580.2(a)(1) (2005 & Supp. 2009); COLO. REV. STAT. § 10-4-609(1)(a) (2008); DEL. CODE ANN. tit. 18, § 3902(a) (1999); D.C. CODE ANN. § 31-2406(a)(1)(D), (f)(2) (LexisNexis Supp. 2008); FLA. STAT. ANN. § 627.727(1) (West 2005); HAW. REV. STAT. § 431:10C-301(b)(3) (2005); IDAHO CODE ANN. § 41-2502 (2003); IND. CODE ANN. § 27-7-5-2(a)(2) (LexisNexis 2008); GA. CODE ANN. § 33-7-11 (Supp. 2008); IOWA CODE ANN. § 516A.1 (West 2007); KAN. STAT. ANN. § 40-284(a) (2000); KY. REV. STAT. ANN. § 304.20-020(1) (LexisNexis 2006); LA. REV. STAT. ANN. § 22:680 (2004); MISS. CODE ANN. § 83-11-101 (2000); MONT. CODE ANN. § 33-23-201(1) (2007); NEV. REV. STAT. ANN. § 690B.020(1) (LexisNexis 2003); N.M. STAT. ANN. § 66-5-301(A) (West 2003); N.C. GEN. STAT. § 20-279.21(3) (Supp. 2008); OHIO REV. CODE ANN. § 3937.18A (LexisNexis 2002); OKLA. STAT. tit. 36, § 3636(B) (Supp. 2008); OR. REV. STAT. § 742.502 (2007); R.I. GEN. LAWS § 27-7-2.1(a) (2008); 75 PA. CONS. STAT. ANN. § 1731 (West 2006); S.D. CODIFIED LAWS § 58-11-9 (2005); TENN. CODE ANN. § 56-7-1201(a) (2008); TEX. INS. CODE ANN. § 1952.101(a) (Vernon 2008); UTAH CODE ANN. § 31A-22-305 (2005 & Supp. 2008); WASH. REV. CODE ANN. § 48.22.030(2) (LexisNexis 2008); WYO. STAT. ANN. § 31-10-101 (2007); *State Farm Mut. Auto. Ins. Co. v. Martin*, 289 So. 2d 606 (Ala. 1974); *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998); *Spain v. Valley Forge Ins. Co.*, 731 P.2d 84 (Ariz. 1986); *Am. Nat'l Prop. & Cas. Co. v. Ellis*, 868 S.W.2d 469 (Ark. 1994); *Eliopoulos v. N. River Ins. Co.*, 33 Cal. Rptr. 449 (Ct. App. 1963); *Passamano v. Travelers Indem. Co.*, 882 P.2d 1312 (Colo. 1994); *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712 (Del. 1995); *Murrell v. Criterion Ins. Co.*, 551 A.2d 95 (D.C. 1988); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624 (Fla. Dist. Ct. App. 2006); *Abrohams v. Atl. Mut. Ins. Agency*, 638 S.E.2d 330 (Ga. Ct. App. 2006); *Walton v. State Farm Mut. Auto. Ins. Co.*, 518 P.2d 1399 (Haw. 1974); *Martinez v. Idaho Counties Reciprocal Mgmt. Program*, 999 P.2d 902 (Idaho 2000); *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524 (Ind. 2002); *Cronbaugh v. Farmland Mut. Ins. Co.*, 475 N.W.2d 652 (Iowa Ct. App. 1991); *Van Hoozer v. Farmers Ins. Exch.*, 549 P.2d 1354 (Kan. 1976); *Jones v. Safeway Ins. Co. of La.*, 817 So. 2d 454 (La. Ct. App. 2002); *Trotter v. Fed. Ins. Co.*, 865 So. 2d 411 (Miss. Ct. App. 2004); *Bartell v. Am. Home Assurance Co.*, 49 P.3d 623 (Mont. 2002); *Hartz v. Mitchell*, 822 P.2d 667

statutes is to provide protection to insured motorists and passengers who are injured through no fault of their own,⁶ but rather through the fault of

(Nev. 1991); *State Farm Auto. Ins. Co. v. Kiehne*, 641 P.2d 501 (N.M. 1982); *Martin v. Cont'l Ins. Co.*, 474 S.E.2d 146 (N.C. Ct. App. 1996); *Weddle v. Hayes*, No. 96-BA-44, 1997 Ohio App. LEXIS 4050 (Ohio Ct. App. Sept. 5, 1997); *Gray v. Midland Risk Ins. Co.*, 925 P.2d 560 (Okla. 1996); *White v. Safeco Ins. Co. of Am.*, 680 P.2d 700 (Or. Ct. App. 1984); *Safe Auto Ins. Co. v. Sch. Dist. of Phila.*, 872 A.2d 247 (Pa. Commw. Ct. 2005); *Ferreira v. Integon Nat'l Ins. Co.*, 809 A.2d 1098 (R.I. 2002); *Wegleitner v. Sattler*, 582 N.W.2d 688 (S.D. 1998); *Dunn v. Hackett*, 833 S.W.2d 78 (Tenn. Ct. App. 1992); *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430 (Tex. 2008); *Clark v. State Farm Mut. Auto. Ins. Co.*, 743 P.2d 1227 (Utah 1987); *First Nat'l Ins. Co. of Am. v. Perala*, 648 P.2d 472 (Wash. Ct. App. 1982); *Commercial Union Ins. Co. v. Stamper*, 732 P.2d 534 (Wyo. 1987).

5. CONN. GEN. STAT. ANN. § 38a-336(a)(1) (West 2007); 215 ILL. COMP. STAT. ANN. 5/143a (West Supp. 2008); ME. REV. STAT. ANN. tit. 24-A, § 2902(1) (Supp. 2008); MD. CODE ANN., INS. § 19-509 (LexisNexis Supp. 2008); MASS. GEN. LAWS ANN. ch. 175, § 113L(1) (West 1998); MINN. STAT. ANN. § 65B.49 subd. 3a(1) (West Supp. 2009); MO. ANN. STAT. § 379.203 (West 2002); NEB. REV. STAT. § 44-6408(1) (2004); N.H. REV. STAT. ANN. § 264:15(I) (LexisNexis Supp. 2008); N.J. STAT. ANN. § 17:28-1.1(a)(2) (West 2007); N.Y. INS. LAW § 3420(f)(1) (McKinney Supp. 2009); N.D. CENT. CODE § 26.1-40-15.2 (Supp. 2007); S.C. CODE ANN. § 38-77-150(A) (2002); VT. STAT. ANN. tit. 23, § 941(a) (2007); VA. CODE ANN. § 38.2-2206(A) (2007); W. VA. CODE ANN. § 33-6-31(a) (LexisNexis 2006); WIS. STAT. ANN. § 632.32(4) (West 2007); *Mass v. U.S. Fid. & Guar. Co.*, 610 A.2d 1185 (Conn. 1992); *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052 (Ill. 1999); *Gilchrist v. Defoe*, 594 So. 2d 513 (La. Ct. App. 1992); *Molleur v. Dairyland Ins. Co.*, 942 A.2d 1197 (Me. 2008); *Powell v. State Farm Mut. Auto. Ins. Co.*, 585 A.2d 286 (Md. Ct. Spec. App. 1991); *Dworman v. St. Paul Fire & Marine Ins. Co.*, No. 02-1213B, 2006 Mass. Super. LEXIS 164 (Mass. Dist. Ct. Apr. 5, 2006); *Carlson v. Allstate Ins. Co.*, 734 N.W.2d 695 (Minn. Ct. App. 2007); *Kramer v. Ins. Co. of N. Am.*, 54 S.W.3d 613 (Mo. Ct. App. 2001); *Cont'l W. Ins. Co. v. Conn.*, 629 N.W.2d 494 (Neb. 2001); *Soule v. Stuyvesant Ins. Co.*, 364 A.2d 883 (N.H. 1976); *Rider Ins. Co. v. First Trenton Cos.*, 808 A.2d 143 (N.J. Super. Ct. App. Div. 2002); *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 878 N.E.2d 583 (N.Y. 2007); *DeCoteau v. Nodak Mut. Ins. Co.*, 603 N.W.2d 906 (N.D. 2000); *Nationwide Mut. Ins. Co. v. Erwood*, 644 S.E.2d 62 (S.C. 2007); *Feeley v. Allstate Ins. Co.*, 882 A.2d 1230 (Vt. 2005); *Gen. Accident Fire & Life Assurance Corp. v. Aetna Cas. & Sur. Co.*, 158 S.E.2d 750 (Va. 1968); *Jewell v. Ford*, 590 S.E.2d 704 (W. Va. 2003); *Teschendorf v. State Farm Ins. Cos.*, 717 N.W.2d 258 (Wis. 2006).

6. *LeFevre v. Westberry*, 590 So. 2d 154 (Ala. 1991); *Peter v. Schumacher Enters., Inc.*, 22 P.3d 481 (Alaska 2001); *Allstate Ins. Co. v. Smith*, 88 Cal. Rptr. 593 (Ct. App. 1970); *Farmers Ins. Exch. v. McDermott*, 527 P.2d 918 (Colo. Ct. App. 1974); *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449 (Del. 1994); *Armstrong v. Allstate Ins. Co.*, 712 So. 2d 788 (Fla. Dist. Ct. App. 1998); *Travelers Indem. Co. v. Loan Corp. of Poplar*, 231 S.E.2d 399 (Ga. Ct. App. 1976); *Liberty Dawes v. First Ins. Co. of Haw.*, 883 P.2d 38 (Haw. 1994); *Am. Family Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571 (Iowa 2004); *Forrester v. State Farm Mut. Auto. Ins. Co.*, 517 P.2d 173 (Kan. 1973); *Thomas v. Nelson*, 295 So. 2d 847 (La. Ct. App. 1974); *Fortin v. York Mut. Ins. Co.*, No. CV-91-517, 1997 Me. Super. LEXIS 4 (Me. Super. Ct. Jan. 2, 1997); *State Farm Mut. Auto. Ins. Co. v. DeHaan*, 900 A.2d 208 (Md. 2006); *Washington v. Ga. Am. Ins. Co.*,

financially irresponsible drivers.⁷ Another objective is to provide the same protection to the person injured by an uninsured motorist as if he had been injured in an accident caused by an insured automobile.⁸ Thus,

540 So. 2d 22 (Miss. 1989); *Wendell v. State Farm Mut. Auto. Ins. Co.*, 974 P.2d 623 (Mont. 1999); *Herrera v. Am. Standard Ins. Co.*, 279 N.W.2d 140 (Neb. 1979); *Courtemanche v. Lumbermens Mut. Cas. Co. & Home Ins. Co.*, 385 A.2d 105 (N.H. 1978); *Shaw v. City of Jersey City*, 811 A.2d 404 (N.J. 2002); *State Farm Mut. Auto. Ins. Co. v. Jones*, 135 P.3d 1277 (N.M. Ct. App. 2006); *Chavez v. State Farm Mut. Auto. Ins. Co.*, 533 P.2d 100 (N.M. 1975); *White v. Ramirez*, 607 N.Y.S.2d 594 (Sup. Ct. 1994); *Brown v. Lumbermens Mut. Cas. Co.*, 204 S.E.2d 829 (N.C. 1974); *Wright v. Fid. & Cas. Co. of N.Y.*, 155 S.E.2d 100 (N.C. 1967); *Webb v. United Servs. Auto. Ass'n*, 323 A.2d 737 (Pa. Super. Ct. 1974).

7. *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So. 2d 1294 (Ala. Civ. App. 1982), *aff'd*, 432 So. 2d 1300 (Ala. 1983); *Nat'l Indem. Co. v. N. Am. Indem.*, No. 1 CA-CV 90-201, 1991 WL 263707 (Ariz. Ct. App. Dec. 17, 1991); *Pardon v. S. Farm Bureau Cas. Ins. Co.*, 868 S.W.2d 468 (Ark. 1994); *Mission Ins. Co. v. Brown*, 407 P.2d 275 (Cal. 1965); *Freeman v. State Farm Mut. Auto. Ins. Co.*, 946 P.2d 584 (Colo. Ct. App. 1997); *D'Andrea v. Allstate Ins. Co.*, No. CV0174433, 2003 Conn. Super. LEXIS 2683 (Conn. Super. Ct. Sept. 24, 2003); *Armstrong v. Allstate Ins. Co.*, 712 So. 2d 788 (Fla. Dist. Ct. App. 1998); *Lee v. Ins. Co. of N. Am.*, 763 P.2d 567 (Haw. 1988); *Schuler v. Erie Ins. Exch.*, 568 A.2d 873 (Md. Ct. Spec. App. 1990); *Sister Thattil v. Dom. Sisters of Charity of the Present'n of the Blessed Virgin, Inc.*, 613 N.E.2d 908 (Mass. 1993); *Dunnam v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668 (Miss. 1979); *Arnold v. Am. Family Mut. Ins. Co.*, 987 S.W.2d 537 (Mo. Ct. App. 1999); *McGlynn v. Safeco Ins. Cos. of Am.*, 701 P.2d 735 (Mont. 1985); *Hood v. AAA Motor Club Ins. Ass'n*, 607 N.W.2d 814 (Neb. 2000); *Wyatt v. Md. Cas. Co.*, 738 A.2d 949 (N.H. 1999); *Shaw v. City of Jersey City*, 811 A.2d 404 (N.J. 2002); *Wright v. Fid. & Cas. Co. of N.Y.*, 155 S.E.2d 100 (N.C. 1967); *N.C. Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 446 S.E.2d 364 (N.C. Ct. App. 1994); *Motorists Mut. Ins. Co. v. Speck*, 393 N.E.2d 500 (Ohio Ct. App. 1977); *Webb v. United Servs. Auto. Ass'n*, 323 A.2d 737 (Pa. Super. Ct. 1974); *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752 (S.D. 1994); *Grange Ins. Ass'n v. Hubbard*, 667 P.2d 121 (Wash. Ct. App. 1983).

8. *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So. 2d 1294 (Ala. Civ. App. 1982), *aff'd*, 432 So. 2d 1300 (Ala. 1983); *Mancillas v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 897 P.2d 691 (Ariz. Ct. App. 1994); *Youngman v. State Farm Mut. Auto. Ins. Co.*, 971 S.W.2d 248 (Ark. 1998); *Furlough v. Transamerica Ins. Co.*, 249 Cal. Rptr. 703 (Ct. App. 1988); *Alliance Mut. Cas. Co. v. Duerson*, 518 P.2d 1177 (Colo. 1974); *Brown v. Comegys*, 500 A.2d 611 (Del. Super. Ct. 1985); *State Farm Mut. Auto. Ins. Co. v. Jenkins*, 370 So. 2d 1201 (Fla. Dist. Ct. App. 1979); *Karasawa v. TIG Ins. Co.*, 961 P.2d 1171 (Haw. Ct. App. 1998); *Greenawalt v. State Farm Ins. Co.*, 569 N.E.2d 154 (Ill. App. Ct. 1991); *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685 (Ind. Ct. App. 2001); *Hinners v. Pekin Ins. Co.*, 431 N.W.2d 345 (Iowa 1988); *Hines v. Potomac Elec. Power Co.*, 504 A.2d 632 (Md. 1986); *Reliance Ins. Co. v. Haney*, 220 N.W.2d 728 (Mich. Ct. App. 1974); *State Farm Mut. Auto. Ins. Co. v. Galloway*, 354 N.W.2d 527 (Minn. Ct. App. 1984); *Rand v. State Farm Mut. Auto. Ins. Co.*, No. DV-03-312, 2005 Mont. Dist. LEXIS 1056 (Mont. Dist. Ct. Mar. 4, 2005); *Allied Mut. Ins. Co. v. Action Elec. Co.*, 593 N.W.2d 275 (Neb. 1999); *Am. States Ins. Co. v. Farm Bureau Ins. Co. of Neb.*, 583 N.W.2d 358 (Neb. Ct. App. 1998); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901 (N.M. 2003); *White v. Ramirez*, 607 N.Y.S.2d 594 (App. Div. 1994); *Graham v.*

uninsured motorist coverage provides an insured with the means to collect damages to which he is legally entitled to for bodily injury, disease, or sickness, including death, caused by an accident arising out of the ownership, maintenance, or use of an uninsured motor vehicle.⁹ Uninsured motorist coverage seeks to pay the insured for losses he is legally entitled to collect as damages for bodily injury from a culpable owner or operator of an uninsured motor vehicle.¹⁰

Uninsured motorist coverage is frequently described as personal and portable. Pursuant to this principle, insureds are covered for injuries caused by an uninsured motorist without regards to an insured automobile. According to the principle of portability, because the uninsured motorist coverage follows a person and not a vehicle, it must provide protection under all circumstances, regardless of whether the individual is in a motor vehicle, on a horse, walking, or relaxing on the front porch when injured by an uninsured motorist.¹¹ In other words,

Travelers Ins. Co., 61 P.3d 225 (Okla. 2002); Babcock v. Adkins, 695 P.2d 1340 (Okla. 1984); Brown v. Travelers Ins. Co., 513 A.2d 1051 (Pa. Super. Ct. 1986); Am. Family Mut. Ins. Co. v. Merrill, 454 N.W.2d 555 (S.D. 1990); Hamaker v. Am. States Ins. Co. of Tex., 493 S.W.2d 893 (Tex. Civ. App. 1973); Hull v. State Farm Mut. Auto. Ins. Co., 586 N.W.2d 863 (Wis. 1998).

9. See *supra* notes 4–5. A few uninsured motorist statutes recognize the right to recover for property damage as well as personal injury. See ALASKA STAT. § 28.20.440(b)(3) (2008); ARK. CODE ANN. § 23-89-404 (Supp. 2007); DEL. CODE ANN. tit. 18, § 3902(a) (1999); D.C. CODE ANN. § 31-2406(a)(1)(D), (f)(2) (LexisNexis Supp. 2008); GA. CODE ANN. § 33-7-11(a)(1) (Supp. 2008); HAW. REV. STAT. § 431:10C-301(a)(2) (2005); 215 ILL. COMP. STAT. ANN. 5/143a(2) (West Supp. 2008); IND. CODE ANN. § 27-7-5-2(a)(1) (LexisNexis 2008); MISS. CODE ANN. § 83-11-101(2) (1999); N.J. STAT. ANN. § 17:28-1.1(a)(2) (West 2007); N.M. STAT. ANN. § 66-5-301(C) (West 2003); N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 2008); OHIO REV. CODE ANN. § 3937.18(A) (LexisNexis 2002); R.I. GEN. LAWS § 27-7-2.1(a) (2008); S.C. CODE ANN. § 38-77-150(A) (2002); TEX. INS. CODE ANN. § 1952.101(a) (Vernon 2002); UTAH CODE ANN. § 31A-22-305.5 (2005); VA. CODE ANN. § 38.2-2206(A) (2007); WASH. REV. CODE ANN. § 48.22.030(2) (LexisNexis 2008); W. VA. CODE ANN. § 33-6-31(a) (LexisNexis 2006).

10. Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989).

11. Peachtree Cas. Ins. Co. v. Sharpton, 768 So. 2d 368 (Ala. 2000); Higgins v. Fireman's Fund Ins. Co., 770 P.2d 324 (Ariz. 1989); State Farm Mut. Auto. Ins. Co. v. Progressive Marathon Ins. Co., 55 Cal. Rptr. 3d 478 (App. Dep't Super. Ct. 2007); DeHerrera v. Sentry Ins. Co., 30 P.3d 167 (Colo. 2001); Ruggiero v. Montgomery Mut. Ins. Co., No. 03C-04-022 ESB, 2004 Del. Super. LEXIS 207 (Del. Super. Ct. June 28, 2004); Coleman v. Fla. Ins. Guar. Ass'n, 517 So. 2d 686 (Fla. 1988); Rampley v. Doe, 347 S.E.2d 255 (Ga. Ct. App. 1986); Lee v. Ins. Co. of N. Am., 762 P.2d 809 (Haw. Ct. App. 1988); Shefner v. Ill. Farmers Ins. Co., 611 N.E.2d 626 (Ill. App. Ct. 1993); Ind. Farmers Mut. Ins. Co. v. Speer, 407 N.E.2d 255 (Ind. Ct. App. 1980); Hornick v. Owners Ins. Co., 511 N.W.2d 370 (Iowa 1993); Kan. Farm Bureau Ins. Co. v. Cool, 471 P.2d 352 (Kan. 1970); Hamilton v. Allstate Ins. Co., 789 S.W.2d 751 (Ky. 1990); Md. Auto. Ins.

uninsured motorist coverage is not dependent on the insured being injured in connection with a vehicle which is covered by a liability insurer against whom recovery is being sought. While uninsured motorist coverage is conditioned on the existence of an underlying liability policy, the insured seeking uninsured motorist benefits need not have liability coverage in all events and for all purposes.¹² The principle of portability is a policy concept pursuant to which insurance exclusions, conditions, or limitations that restrict or preclude uninsured motorist coverage are evaluated for purposes of determining their validity.¹³

The principle of portability is by no means absolute. Not all contractual restraints on uninsured motorist coverage are invalid. For example, in *Blazekovic v. American Family Mutual Insurance Co.*,¹⁴ the Supreme Court of Wisconsin was called upon to determine whether a "drive other car" exclusion was a valid uninsured motorist exclusion.¹⁵ According to the court, the issue was one of statutory interpretation that turned upon "the language of Wisconsin Stat. § 632.32(5)(e), which states that '[a] policy may provide for exclusions not prohibited by sub. (6) or other applicable law.'"¹⁶ In light of the statutory language, the court in *Blazekovic* employed a two-part analysis.¹⁷ The first part consisted of an examination of whether the exclusion came within "the description of any of the enumerated prohibitions" in the uninsured motorist statute.¹⁸ "If it does, the matter is resolved, and the exclusion is

Fund v. Erie Ins. Exch., 660 A.2d 929 (Md. Ct. Spec. App. 1995); Sister Thatil v. Dom. Sisters of Charity of Presnt'n of the Blessed Virgin, Inc., 613 N.E.2d 908 (Mass. 1993); Madar v. League Gen. Ins. Co., 394 N.W.2d 90 (Mich. Ct. App. 1986); Gudvangen v. Austin Mut. Ins. Co., 284 N.W.2d 813 (Minn. 1978); Gibbs v. Nat'l Gen. Ins. Co., 938 S.W.2d 600 (Mo. Ct. App. 1997); Jacobson v. Implement Dealers Mut. Ins. Co., 640 P.2d 908 (Mont. 1982); Nationwide Mut. Ins. Co. v. Mabe, 444 S.E.2d 664 (N.C. Ct. App. 1994); Bray v. N.C. Farm Bureau Mut. Ins. Co., 445 S.E.2d 79 (N.C. Ct. App. 1994); Murfield v. State Farm Ins. Co., No. 84-CA-30, 1985 Ohio App. LEXIS 7668 (Ohio Ct. App. Apr. 6, 1985); Cothren v. Emcasco Ins. Co., 555 P.2d 1037 (Okla. 1976); Nationwide Mut. Ins. Co. v. Erwood, 611 S.E.2d 319 (S.C. Ct. App. 2005); Dupree v. Doe, 772 S.W.2d 910 (Tenn. Ct. App. 1989); Grange Ins. Ass'n v. Hubbard, 667 P.2d 121 (Wash. Ct. App. 1983); Teschendorf v. State Farm Ins. Cos., 717 N.W.2d 258 (Wis. 2006).

12. See *State Farm Mut. Auto. Ins. Co. v. Jackson*, 462 So. 2d 346 (Ala. 1984).

13. See cases cited *supra* note 11.

14. *Blazekovic v. Am. Family Mut. Ins. Co.*, 610 N.W.2d 467 (Wis. 2000).

15. *Id.* at 468.

16. *Id.* at 470 (quoting WIS. STAT. § 632.32(5)(e) (1998)).

17. *Id.*

18. *Id.*

invalid.”¹⁹ If the exclusion does not fit an enumerated prohibition, the analysis proceeds to the second part of the test, which consists of an examination of “any ‘other applicable law’ that may prohibit the exclusion.”²⁰ “Absent any other applicable law prohibiting the exclusion, it remains valid.”²¹

The *Blazekovic* court found the exclusions did “not fall under [one of] the enumerated exclusions prohibited under Wis. Stat. § 632.32(6);” thus the court proceeded to the second prong of the test and examined whether the exclusion was prohibited by “other applicable law.”²² According to the insured, Wis. Stat. § 632.32(5)(j) represented the other law prohibiting the exclusion.²³ In essence, *Blazekovic* argued that this statutory provision was “unambiguous and permit[ted] ‘drive other car’ exclusions only when all [of its] requirements [were] satisfied.”²⁴ In resolving the issue before it, the *Blazekovic* court, observed that Wis. Stat. § 632.32(5)(j) had “replaced the broad proposition . . . that uninsured motorist coverage is available in *all* circumstances.”²⁵ In essence, the statute allows such exclusions only when a specific set of required conditions had been satisfied. As observed by the court, “[i]nstead, the legislature engrafted a permissible ‘drive other car’ exclusion that must comply with three specific requirements. This reflects the legislative intent to prohibit restrictions of uninsured motorist coverage except in a singular set of circumstances.”²⁶

The validity of an exclusion that restricts the portability of uninsured motorist coverage was also addressed by the Supreme Court of Pennsylvania in *Burstein v. Prudential Property & Casualty Insurance Co.*²⁷ Therein, the injured parties were driving a company car, which did not have underinsured motorist coverage, when they were struck by a speeding motorcyclist.²⁸ The motorcyclist’s policy did not cover all of their injuries.²⁹ Therefore, the injured parties sought underinsured motorist coverage from the insurer of their three personal vehicles, which

19. *Id.*

20. *Id.* (quoting § 632.32(6)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 471.

25. *Id.* at 472.

26. *Id.* at 473.

27. *Burstein v. Prudential Prop. & Cas. Ins. Co. (Burstein I)*, 809 A.2d 204 (Pa. 2002).

28. *Id.* at 205.

29. *Id.*

were not involved in the accident.³⁰ The insurer denied coverage on the basis of the “regularly used, non-owned car exclusion.”³¹ The trial court concluded that the exclusion was void because: “(1) Pennsylvania’s Motor Vehicle Financial Responsibility Law . . . should be construed to provide the greatest possible coverage to injured claimants; (2) providing UIM [underinsured motorist] coverage is in the public’s best interest; and (3) UIM coverage is first-party coverage and therefore ‘follows the person, not the vehicle.’”³² Thus, according to the trial court, “voiding the exclusion ‘furthers the aforementioned public policies by providing the greatest possible coverage to the [Bursteins].’”³³

In *Burstein*, the Pennsylvania Supreme Court formulated the dispositive issue as “whether the regularly used, non-owned car exclusion and its contractual restraint on UIM portability violate[d] a clearly expressed public policy.”³⁴ Unlike the approach employed in *Blazekovic*, which concentrated on the statutory language,³⁵ a pure public policy approach looks beyond the language of the statute and focuses on the underlying legislative purpose for enacting the statute. In *Burstein*, the court acknowledged that “the enactment of the MVFRL [Motor Vehicle Financial Responsibility Law] reflected a legislative concern for the spiralling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways.”³⁶ The effect of voiding the exclusion would thus frustrate the dominant and overarching public policy underlying the MVFRL by compelling insurers to underwrite unknown risks that they had not been compensated to insure.³⁷ Relying on public policy, the Pennsylvania Supreme Court ultimately concluded that the state’s uninsured motorist law contemplated that uninsured and underinsured motorist coverage may be portable in some instances.³⁸ This view of the role of the principle of portability in determining the validity of a policy exclusion, restriction, or condition reflects a reversal in fortunes, in that, the exclusion is assumed valid until proven otherwise. Uninsured motorist

30. *Id.*

31. *Id.*

32. *Id.* at 206 (quoting *Burstein v. Prudential Prop. & Cas. Ins. Co. (Burstein II)*, 742 A.2d 684, 686 (Pa. Super. Ct. 1999)).

33. *Id.* (quoting *Burstein II*, 742 A.2d at 688).

34. *Id.* at 209.

35. *See id.*

36. *Id.* at 207.

37. *Id.* at 208.

38. *Id.* at 209 n.7, 210 n.8.

coverage requires reimbursement to the insured by his own carrier for the type of loss set out in the uninsured motorist statute that would have been covered by an automobile liability policy had the uninsured motorist been insured.³⁹ The overarching purpose of uninsured motorist laws is to fill gaps in compulsory insurance plans by providing the same protection to a person injured by an uninsured motorist as would have been available had the tortfeasor been insured.⁴⁰ In this context, gap coverage represents an expression of the legislative intent that uninsured motorist coverage provide compensation and fill the gap to the extent of its monetary limits for the benefit of the insured motorist, who has purchased uninsured motorist coverage, and cannot be made whole because of the financial irresponsibility of the tortfeasor.⁴¹ In jurisdictions that have adopted the gap coverage theory,

an insured is allowed to recover under his UM coverage only if the tortfeasor's policy limit is less than the injured insured's UM policy limit. For example, if an injured insured has \$100,000 in damages, the tortfeasor has a \$10,000 policy limit, and the injured insured's UM policy limit is \$50,000, the insured can collect only \$40,000 from his UM carrier. But if the tortfeasor has \$75,000 in coverage the insured can collect nothing from his UM carrier. This is so because there is no "gap," as the tortfeasor's \$75,000 policy limit exceeds the UM carrier's

39. *State Farm Mut. Auto. Ins. Co. v. Progressive Marathon Ins. Co.*, 55 Cal. Rptr. 3d 478 (App. Dep't Super. Ct. 2007); *McKenzie v. Dattco, Inc.*, No. CV970541370S, 2001 Conn. Super. LEXIS 1618 (Conn. Super. Ct. June 11, 2001); *Goodman v. Am. Cas. Co.*, 643 N.E.2d 432 (Mass. 1994).

40. *State Farm Mut. Auto. Ins. Co. v. Griffin*, 286 So. 2d 302 (Ala. Civ. App. 1973); *Lowling v. Allstate Ins. Co.*, 859 P.2d 724 (Ariz. 1993); *Interinsurance Exch. of the Auto. Club of S. Cal. v. Alcivar*, 156 Cal. Rptr. 914 (Ct. App. 1979); *Jeanes v. Nationwide Ins. Co.*, 532 A.2d 595 (Del. Ch. 1987); *State Farm Mut. Auto. Ins. Co. v. Royston*, 817 P.2d 118 (Haw. 1991); *Banes v. W. States Ins. Co.*, 616 N.E.2d 1021 (Ill. App. Ct. 1993); *Am. Family Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571 (Iowa 2004); *Thomas v. Am. Family Mut. Ins. Co.*, 485 N.W.2d 298 (Iowa 1992); *Forrester v. State Farm Mut. Auto. Ins. Co.*, 517 P.2d 173 (Kan. 1973); *Legassie v. Deane*, No. CV-96-410, 1999 Me. Super. LEXIS 80 (Me. Super. Ct. Mar. 17, 1999); *Heavens v. Laclede Gas Co.*, 755 S.W.2d 331 (Mo. Ct. App. 1988); *Dakota Fire Ins. Co. v. Oie*, 968 P.2d 1126 (Mont. 1998); *McCaffery v. St. Paul Fire & Marine Ins. Co.*, 236 A.2d 490 (N.H. 1967); *Riccio v. Prudential Prop. & Cas. Ins. Co.*, 531 A.2d 717 (N.J. 1987); *Ins. Co. of N. Am. v. Godwin*, 361 N.Y.S.2d 461 (App. Div. 1974); *Autry v. Aetna Life & Cas. Ins. Co.*, 242 S.E.2d 172 (N.C. Ct. App. 1978); *DeCoteau v. Nodak Mut. Ins. Co.*, 603 N.W.2d 906 (N.D. 2000); *Clark v. Am. Family Mut. Ins. Co.*, 577 N.W.2d 790 (Wis. 1998).

41. *See Sec. Nat'l Ins. Co. v. Hand*, 107 Cal. Rptr. 439 (Ct. App. 1973).

\$50,000 policy limit. In short, in “gap” states unless the tortfeasor’s policy limit is less than the UM carrier’s policy limit, the UM carrier is exempted from payment as a matter of law.⁴²

The gap rationale provides the conceptual basis for two general types of uninsured motorist statutes: minimum liability/limited recovery statutes and full/broad recovery statutes. The majority of jurisdictions have “minimum liability” statutes, which are intended to protect injured insured motorists by guaranteeing that they will be able to recover at least an amount equivalent to what would have been available had the insured been injured by a driver who maintained the required statutory minimum liability coverage.⁴³ A minimum liability or limited coverage statute “allows the insured . . . to collect damages only up to [the] statutory minimum[,] notwithstanding the actual damages.”⁴⁴ “[A]ll sums collected [are] credited towards reaching the statutory minimum.”⁴⁵

Full or broad recovery statutes attempt to better compensate insureds for their actual damages. They allow the insured to recover up to the policy limits so long as the sum of the insured’s recovery under the uninsured motorist coverage and any other payment does not exceed the insured’s actual damages.⁴⁶ Full recovery statutes are typically construed

42. GEICO Gen. Ins. Co. v. Nw. Pac. Indem. Co., 115 P.3d 856, 859 (Okla. 2005); see also Webb v. U.S. Fid. & Guar. Co., 605 A.2d 1344 (Vt. 1992).

43. See, e.g., Safeco Ins. Co. of Am. v. Jones, 243 So. 2d 736 (Ala. 1970); Interinsurance Exch. of the Auto. Club of S. Cal. v. Alcivar, 156 Cal. Rptr. 914 (Ct. App. 1979); Shelter Mut. Ins. Co. v. Thompson, 852 P.2d 459 (Colo. 1993); Palisbo v. Hawaiian Ins. & Guar. Co., 547 P.2d 1350 (Haw. 1976); Luechtefeld v. Allstate Ins. Co., 656 N.E.2d 1058 (Ill. 1995); Thomas v. Am. Family Mut. Ins. Co., 485 N.W.2d 298 (Iowa 1992); McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321 (Iowa 1976); Powell v. State Farm Mut. Auto. Ins. Co., 585 A.2d 286 (Md. Ct. Spec. App. 1991); Bullock v. Commerce Ins. Co., No. 91-08804, 1996 Mass. Super. LEXIS 630 (Mass. Super. Ct. Jan. 15, 1996); Am. Standard Ins. Co. of Wis. v. Bracht, 103 S.W.3d 281 (Mo. Ct. App. 2003); Rowe v. Travelers Indem. Co., 800 P.2d 157 (Mont. 1990); Poper v. Rollins, 90 S.W.3d 682 (Tenn. 2002).

44. Poper v. Rollins, 90 S.W.3d 682, 686 (Tenn. 2002). See cases cited *supra* note 40.

45. Poper, 90 S.W.3d at 686.

46. See, e.g., Progressive Ins. Co. v. Simmons, 953 P.2d 510 (Alaska 1998); Mass v. U.S. Fid. & Guar. Co., 610 A.2d 1185 (Conn. 1992); Hurst v. Nationwide Mut. Ins. Co., 652 A.2d 10 (Del. 1995); Travelers Indem. Co. v. Williams, 167 S.E.2d 174 (Ga. Ct. App. 1969); United Nat’l Ins. Co. v. Deprizio, 705 N.E.2d 455 (Ind. 1999); O’Donoghue v. Farm Bureau Mut. Ins. Co., 66 P.3d 822 (Kan. 2003); Babineaux v. Domingue, 529 So. 2d 45 (La. Ct. App. 1988); Legassie v. Deane, No. CV-96-410, 1999 Me. Super. LEXIS 80 (Me. Super. Ct. Mar. 17, 1999); Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1978); United Servs. Auto. Ass’n v. Wilkinson, 569 A.2d 749 (N.H. 1989); Sloan

to prohibit offsets that limit or restrict the insured's full damage recovery.⁴⁷ The insured's coverage, in a sense, is in excess and above that of the tortfeasor's, subject only to the actual damages suffered.⁴⁸

Whether a particular statute is minimum liability or full recovery boils down to a matter of legislative intent as determined by the court from the purpose of the statute. For example, the Supreme Court of Colorado in *Shelter Mutual Insurance Co. v. Thompson*⁴⁹ observed that:

"The legislative 'declaration of purpose' to the uninsured motorist statute, 1965 Perm.Supp., C.R.S.1963, 17-12-20, expresses no intention to require full indemnification from all insurers of uninsured motorist victims. Rather, the express[ed] intent [was] 'to induce and encourage' all motorists to provide for their financial responsibility for the protection of others from financially irresponsible uninsured motorists. Had the legislature intended full indemnification it would not have granted the option of totally rejecting the uninsured motorist coverage."⁵⁰

....

"The purpose of the uninsured motorist coverage mandated by section 10-4-609 is to compensate an innocent insured for loss, subject to the insured's policy limits, caused by financially irresponsible motorists. The legislative intent is satisfied by coverage that compensates a person injured by an uninsured motorist to the same extent as one injured by a motorist who is insured in compliance with the law. Section 10-4-609 does not require full indemnification of losses suffered at the hands of uninsured motorists under all circumstances."⁵¹

Uninsured motorist statutes typically provide one of four options regarding the amount of coverage: (1) it is restricted to the statutory minimum for death or bodily injury prescribed by law; (2) it may not be less than the minimum limits of bodily injury liability coverage required

v. Dairyland Ins. Co., 519 P.2d 301 (N.M. 1974).

47. See cases cited *supra* note 46.

48. See *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

49. *Shelter Mut. Ins. Co. v. Thompson*, 852 P.2d 459 (Colo. 1993).

50. *Id.* at 464 (quoting *Alliance Mut. Cas. Co. v. Duerson*, 518 P.2d 1177, 1180 (Colo. 1974)).

51. *Id.* at 466 (quoting *Terranova v. State Farm Mut. Auto. Ins. Co.*, 800 P.2d 58, 61 (Colo. 1990)) (citations omitted).

by law; (3) it must be equal to the limits of bodily injury liability coverage in the policy; or (4) it is restricted to the statutory minimum for death or bodily injury provided by law, but coverage may be purchased in limits up to the amount of the bodily injury coverage of the policy. Courts that have adopted the minimum liability view seemed to be influenced by statutory language that restricts uninsured motorist coverage to the minimum coverage required by law—i.e. option (1).⁵² Courts that have adopted the full recovery view were typically influenced by statutory language that required the insurer to provide coverage in an amount equal to or not less than the limits of bodily injury liability provided in the policy—i.e., options (2) and (3).⁵³ Full-recovery uninsured motorist statutes, subject to statutory exceptions allowing set-off and prohibiting duplicate recovery, allow the insured the same recovery that would have been available to her had the tortfeasor been insured to the same extent as the insured herself.⁵⁴

Uninsured motorist statutes that require vehicle owners to obtain the minimum coverage required by law but provide an option to select and purchase the amount of uninsured motorist coverage desired up to the bodily injury liability limits of the policy are also generally classified as full recovery.⁵⁵ Language of this sort, in effect, allows an insured to increase his uninsured motorist coverage to any amount and thus choose the maximum limit of protection. Uninsured motorist coverage is, in effect, a substitute for the insurance the tortfeasor should have had.

Some courts attribute less significance to the option to purchase limits of uninsured motorist coverage in excess of the mandatory

52. See, e.g., *Hackett v. Allstate Ins. Co.*, No. 06-cv-00521-REB-BNB, 2007 U.S. Dist. LEXIS 16262 (D. Colo. Mar. 6, 2007); *Cont'l Ins. Co. v. Howe*, 488 So. 2d 917 (Fla. Dist. Ct. App. 1986); *S. Am. Ins. Co. v. Dobson*, 441 So. 2d 1185 (La. 1983); *Rowe v. Travelers Indem. Co.*, 800 P.2d 157 (Mont. 1990); *Kromer v. Reliance Ins. Co.*, 677 A.2d 1224 (Pa. Super. Ct. 1996); *Poper v. Rollins*, 90 S.W.3d 682 (Tenn. 2002).

53. See, e.g., *Mass v. U.S. Fid. & Guar. Co.*, 610 A.2d 1185 (Conn. 1992); *S. Am. Ins. Co. v. Dobson*, 441 So. 2d 1185 (La. 1983); *Rowe v. Travelers Indem. Co.*, 800 P.2d 157 (Mont. 1990); *United Servs. Auto. Ass'n v. Wilkinson*, 569 A.2d 749 (N.H. 1989); *Kromer v. Reliance Ins. Co.*, 677 A.2d 1224 (Pa. Super. Ct. 1996).

54. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Jenkins*, 370 So. 2d 1201 (Fla. Dist. Ct. App. 1979).

55. See, e.g., *Spain v. Valley Forge Ins. Co.*, 731 P.2d 84 (Ariz. 1986) (full recovery); *Hackett v. Allstate Ins. Co.*, No. 06-cv-00521-REB-BNB, 2007 U.S. Dist. LEXIS 16262 (D. Colo. Mar. 6, 2007); *Mass v. U.S. Fid. & Guar. Co.*, 610 A.2d 1185 (Conn. 1992) (full recovery); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978) (full recovery); *United Servs. Auto. Ass'n v. Wilkinson*, 569 A.2d 749 (N.H. 1989) (full recovery).

minimum.⁵⁶ For example, in *Hackett v. Allstate Insurance Co.*,⁵⁷ the court disagreed with the conclusion that a statute, which provides an insured with the option to purchase additional uninsured motorist protection should be classified as full recovery.⁵⁸ As observed by the court,

[i]t appears plaintiffs may be operating under the impression that, because Colorado's UM statute further requires that insureds must be offered the opportunity to purchase additional insurance up to the bodily injury liability limits of the policy or \$ 100,000 per person and \$ 300,000 per accident, whichever is less, the Colorado statute is a full coverage statute. This argument confuses two separate issues. Although section 10-4-609 (2) requires the insurer to offer higher limits of UM coverage, the insured is not required to maintain coverage higher

56. See, e.g., *Mann v. Farmers Ins. Co.*, 761 P.2d 460 (Okla. 1988). The Oklahoma Supreme Court has not expressly classified Oklahoma's uninsured motorist statute as either minimum liability or full recovery. Nevertheless,

This Court has stated that the intent of the uninsured motorist legislation is to afford to one insured under his own liability insurance policy the same protection in the event he is injured by an uninsured motorist as he would have had if the negligent motorist had carried liability insurance. In subsection (B) of section 3636, it is provided that the uninsured motorist coverage provided as a part of a liability policy shall not be less than that required under 47 O.S. 1981 § 7-204, with the insured to have the option to purchase increased limits of liability not to exceed the limits provided for bodily injury under the policy. Section 7-204 sets the minimum limits of liability coverage required to be carried by all owners of vehicles registered in the State of Oklahoma.

The purpose of the uninsured motorist provision, when viewed in light of the requirement that it provide minimum standards of protection, is that it place[s] the insured in the same position he would have been in if the negligent uninsured motorist had complied with Oklahoma laws concerning financial responsibility. To find it applicable to supplemental liability policies, as argued by plaintiff as her interpretation of the "[n]o policy insuring against loss . . ." language, would place one injured by an uninsured motorist in the same position as if the uninsured motorist had carried the same liability coverage as the injured party.

Moser v. Liberty Mut. Ins. Co., 731 P.2d 406, 408 (Okla. 1986) (footnotes omitted). This language strongly suggests that Oklahoma's uninsured motorist law is minimum liability. See also *Gray v. Midland Risk Ins. Co.*, 925 P.2d 560 (Okla. 1996) (amount of uninsured motorist coverage may not exceed liability; the amount of uninsured motorist coverage that will be imputed as a matter of law is the statutory minimum).

57. *Hackett v. Allstate Ins. Co.*, No. 06-cv-00521-REB-BNB, 2007 U.S. Dist. LEXIS 16262 (D. Colo. Mar. 6, 2007).

58. See *id.* at *9.

than that prescribed under *section 10-4-609 (1)*. The fact that the insured can reject even the minimum level of UM coverage all together lends further credence to the conclusion that Colorado's UM statute is a minimum recovery statute.⁵⁹

The practical effect of an uninsured motorist statute's classification as minimum liability or full recovery on the insured's recovery can be quite significant. For example, in *Palisbo v. Hawaiian Insurance & Guaranty Co.*,⁶⁰ the Hawaii Supreme Court was asked to calculate an insured's entitlement from its uninsured motorist carrier after receiving a recovery from the tortfeasor's liability carrier.⁶¹ *Palisbo* involved a car owned by Damasco Clemente, which was being driven by his son, Glen Clemente, a minor.⁶² As a result of Glen's negligence, the car he was driving

struck a guy wire supporting a telephone pole and was wrecked. Glen Clemente, Kurt Bruhn, and Markam Palisbo were all injured in varying degrees, while Neal Ramos and Richard Muneoka were killed.

Markam F. Palisbo filed suit against Glen Clemente and his parents, for the injuries he sustained . . . and was awarded judgment in the [amount] of \$30,000. . . . [The] parents of Neal Ramos . . . filed suit against the same defendants for the death of their son, and obtained judgment in the [amount] of \$42,027.21.

State Farm Fire and Casualty Company [insured the car] driven by Glen . . . , under [a] . . . policy with bodily injury limits of liability of \$10,000 per person and . . . \$20,000 per accident.⁶³

State Farm deposited the \$20,000 per accident limits with the court and requested it to prorate the funds among the parties entitled thereto.⁶⁴

The trial court did so by allocating \$6,000 to Markam Palisbo, \$6,500 to Michael M. Ramos and Carol T. Ramos, and the balance to Kurt Bruhn and the survivors of Richard Muneoka.

59. *Id.* (citations omitted).

60. *Palisbo v. Hawaiian Ins. & Guar. Co.*, 547 P.2d 1350 (Haw. 1976).

61. *Id.* at 1352-53.

62. *Id.* at 1352.

63. *Id.*

64. *Id.*

At the time of the accident, Markam Palisbo was covered by a policy of insurance issued by Hawaiian Insurance & Guaranty Company, [Ltd.] containing an uninsured motorist provision which [obligated] the . . . company to pay "all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured." Neal Ramos and his parents were insured under a similar policy by Government Employees Insurance Company. Both policies [contained a 10/20 limit].

Palisbo and the parents . . . of Neal Ramos [filed suit] against their respective insur[ers], each seeking the maximum amount of \$10,000, under their "uninsured motorist" policies. The defendant insurance companies denied liability. . . . The trial court denied the insurance companies' motions [for summary judgment] . . . [and] . . . awarded \$4,000 to Plaintiff Palisbo, and \$3,500 to Plaintiffs Ramos. These amounts represented . . . the difference between the sum received from the [tortfeasor's] insur[er] and [their respective] uninsured . . . policy limit of \$10,000. . . . From these judgments the plaintiffs appeal[ed].⁶⁵

On appeal, "[t]he plaintiffs [argued] . . . that they [were] entitled to the full face value of their respective policies, in addition to the amount they [had] received [from] the tortfeasor's [carrier]."⁶⁶ The Supreme Court of Hawaii disagreed, concluding that "[r]ecover by the plaintiffs under both the tortfeasor's policy and their respective uninsured motorist policies is limited to the minimum amounts specified in the financial responsibility law."⁶⁷ According to the court, "[c]overage in excess of those minimum amounts must be the direct result of contractual arrangements between the parties."⁶⁸

In *Legassie v. Deane*,⁶⁹ Robert Legassie sustained personal injuries for which the tortfeasor's, William Deane, automobile liability policy would provide benefits of \$100,000.⁷⁰ Legassie was also insured under a

65. *Id.* at 1352-53.

66. *Id.* at 1354.

67. *Id.*

68. *Id.* at 1354-55.

69. *Legassie v. Deane*, No. CV-96-410, 1999 Me. Super. LEXIS 80 (Me. Super. Ct. Mar. 17, 1999).

70. *Id.* at *1.

\$1,000,000 underinsured motorist policy provided by his employer through a policy with Royal Insurance Company.⁷¹ Because Legassie's injuries were work-related, he received worker's compensation benefits in excess of \$460,000.⁷² Royal's policy contained two provisions which, if valid, would reduce any potential underinsured motorist liability to the insured under the policy.⁷³ The first provision provided for an exception to coverage which would relieve the carrier of liability to the extent of any workers' compensation benefits paid to the insured.⁷⁴ The second provision "constitute[d] an offset or limitation on Royal's liability."⁷⁵ "[T]he contract provide[d] that 'any amount payable under this [policy] shall be reduced by . . . all sums paid or payable under any workers' compensation, disability benefits or similar law . . .'"⁷⁶ Legassie had received in excess of \$460,000 in workers' compensation benefits, as a result, the contractual provision, if enforceable, would reduce Royal's obligation from \$900,000, the difference between the tortfeasor's coverage and Royal's uninsured motorist coverage, to roughly \$440,000.⁷⁷ Thus, as a consequence of continued receipt of workers' compensation benefits, Legassie would be faced with "the prospect of surrendering his claim to all . . . remaining benefits under" Royal's policy.⁷⁸ Royal conceded, however, "that regardless of the effect of this offset [provision], it remain[ed] liable for the minimum levels of [uninsured motorist] coverage required by [law], namely, \$ 20,000 per person and a maximum of \$ 40,000 per accident."⁷⁹

According to the court in *Legassie*,

[t]he first stage of [the] analysis calls for consideration of the purpose of the statute:

The dominant purpose of the mandatory uninsured vehicle coverage statute is to provide to the insured victim of an accident a source for the collection of "all sums which the victim is legally entitled to recover as damages against the

71. *Id.*

72. *Id.* at *2.

73. *Id.*

74. *Id.* at *2-3.

75. *Id.* at *5.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

owner or operator of an uninsured motor vehicle["]. . . . In extending the law to require underinsured as well as uninsured motorist coverage, the legislature "intended to permit the insured injured person *the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the injured party.*"⁸⁰

"[A]pplication of the worker's compensation [benefit] offset [to the uninsured motorist] contract would deprive Legassie of at least part of [the] recovery to which he [was] entitled [to recover] from the tortfeasor."⁸¹ "If the tortfeasor were as fully insured as Legassie, Legassie would stand to recover up to \$ 1,000,000 for his injuries."⁸² However, because the tortfeasor had only \$100,000 in coverage, Royal was statutorily required to provide Legassie with an additional \$900,000 in coverage.⁸³ As observed by the court, "[i]f Legassie's underinsured motorist coverage were reduced by the amount of worker's compensation benefits he has received, Royal would fall short of its statutory obligation to ensure that this policy provide Legassie with the same recovery he would have had if the tortfeasor had \$ 1,000,000 in automobile liability coverage."⁸⁴

Uninsured motorist insurance does not insure the uninsured motorist.⁸⁵ "It is a contractual liability [created] by statute between [an

80. *Id.* at *8 (quoting *Tibbetts v. Me. Bonding & Cas. Co.*, 618 A.2d 731, 733-34 (Me. 1992)).

81. *Id.* at *9.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Riccio v. Prudential Prop. & Cas. Ins. Co.*, 531 A.2d 717, 719 (N.J. 1987); *see also Hettel v. Rye*, 475 S.W.2d 536 (Ark. 1972); *Booth v. Fireman's Fund Ins. Co.*, 207 So. 2d 925 (La. Ct. App. 1968); *Hull v. Town of Plymouth*, 724 A.2d 1291 (N.H. 1999); *Hendren v. Allstate Ins. Co.*, 672 P.2d 1137 (N.M. Ct. App. 1983); *Distelhorst v. Great Am. Ins. Co.*, No. 86AP-1167, 1987 Ohio App. LEXIS 10058 (Ohio Ct. App. Dec. 10, 1987); *Thompson v. Parker*, 606 S.W.2d 538 (Tenn. Ct. App. 1980); *Maxey v. Doe*, 225 S.E.2d 359 (Va. 1976); *Employers Health Ins. v. Gen. Cas. Co. of Wis.*, 469 N.W.2d 172 (Wis. 1991). States are divided into two groups regarding whether the uninsured motorist carrier of the insured stands in the shoes of the tortfeasor and can raise and assert any defenses the uninsured motorist could assert. For those states that hold in the affirmative *see State Farm Auto. Ins. Co. v. Baldwin*, 470 So. 2d 1230 (Ala. 1985); *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311 (Ky. 2006) (does for purpose of paying damages); *Nationwide Mut. Ins. Co. v. Webb*, 436 A.2d 465 (Md. 1981); *Lane v. State Farm Mut. Auto. Ins. Co.*, 308 N.W.2d 503 (Neb. 1981); *Hendren v. Allstate Ins. Co.*, 672 P.2d 1137 (N.M. Ct. App. 1983); *Daniels v. Hetrick*, 595 S.E.2d 700 (N.C. Ct. App. 2004); *State*

insurer and its insured] and inures solely to the benefit of the insured.”⁸⁶ Its protection is restricted to those persons falling within the statutory⁸⁷ or policy definition of insured.⁸⁸

Uninsured motorist statutes are remedial in nature and liberally construed in order to effectuate the legislative purpose of protecting persons who are wrongfully injured in automobile accidents from losses that, because of the tortfeasor’s lack of liability coverage, would otherwise go uncompensated.⁸⁹ Consequently, it is universally

Farm Mut. Auto. Ins. Co. v. Gillette, 641 N.W.2d 662 (Wis. 2002) (cannot take advantage of all defenses of uninsured motorist); *but see* *Cooper v. Aplin*, 523 So. 2d 339 (Ala. 1988); *Voland v. Farmers Ins. Co. of Ariz.*, 943 P.2d 808 (Ariz. Ct. App. 1997); *Anderson v. Peerless Ins. Co.*, No. 66861, 1993 Conn. Super. LEXIS 337 (Conn. Super. Ct. Feb. 3, 1993); *Allstate Ins. Co. v. Candreva*, 497 So. 2d 980 (Fla. Dist. Ct. App. 1986); *J.C. Penney Cas. Ins. Co. v. Williams*, 253 S.E.2d 878 (Ga. Ct. App. 1979); *Wineinger v. Ellis*, 855 N.E.2d 614 (Ind. Ct. App. 2006); *Dalton v. State Farm Mut. Auto. Ins. Co.*, No. 65,979, 1991 Kan. App. LEXIS 865 (Kan. Ct. App. Nov. 1, 1991); *Barry v. Keith*, 474 S.W.2d 876 (Ky. Ct. App. 1971) (allowing intervention to assert defenses); *Rand v. State Farm Mut. Auto. Ins. Co.*, No. DV-03-312, 2005 Mont. Dist. LEXIS 1056 (Mont. Dist. Ct. Mar. 4, 2005); *Fetch v. Quam*, 530 N.W.2d 337 (N.D. 1995); *Boris v. Liberty Mut. Ins. Co.*, 515 A.2d 21 (Pa. Super. Ct. 1986); *Chatterton v. Walker*, 938 P.2d 255 (Utah 1997); *Romanick v. Aetna Cas. & Sur. Co.*, 795 P.2d 728 (Wash. Ct. App. 1990); *State ex rel State Farm Mut. Auto. Ins. Co. v. Canady*, 475 S.E.2d 107 (W. Va. 1996). For those states holding in the negative see *Benzer v. Iowa Mut. Tornado Ins. Ass’n*, 216 N.W.2d 385 (Iowa 1974); *Suchy v. Ill. Farmers Ins. Co.*, 574 N.W.2d 93 (Minn. Ct. App. 1998); *Bill Hodges Truck Co. v. Humphrey*, 704 P.2d 94 (Okla. Civ. App. 1984); *compare* *Briggs v. Am. Family Mut. Ins. Co.*, 833 P.2d 859 (Colo. Ct. App. 1992), *with* *Fireman’s Fund Indem. Co. v. Indust. Accident Comm’n*, 38 Cal. Rptr. 336 (Dist. Ct. App. 1964); *Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo. Ct. App. 2006) (allowing assertion of defenses uninsured motorist failed to raise); *Kent v. Nationwide Prop. & Cas. Ins. Co.*, 844 A.2d 1092 (Del. Super. Ct. 2004); *Evans v. Stuard*, No. 87C-SE-22, 1989 Del. Super. LEXIS 521 (Del. Super. Ct. Oct. 6, 1989); *Murphy v. U.S. Fid. & Guar. Co.*, 458 N.E.2d 54 (Ill. App. Ct. 1983); *Gremillion v. State Farm Mut. Auto. Ins. Co.*, 302 So. 2d 712 (La. Ct. App. 1974); *Medders v. U.S. Fid. & Guar. Co.*, 623 So. 2d 979 (Miss. 1993); *Barker v. Palmarin*, 799 S.W.2d 117 (Mo. Ct. App. 1990); *Lumberman’s Mut. Cas. Co. v. McKinley*, No. 53934, 1988 Ohio App. LEXIS 3142 (Ohio Ct. App. Aug. 4, 1988); *Thaxton v. Travelers Indem. Co.*, 555 S.W.2d 718 (Tenn. 1977); *Bobbitt v. Shelby Mut. Ins. Co. of Shelby, Ohio*, 161 S.E.2d 671 (Va. 1968).

86. *Riccio v. Prudential Prop. & Cas. Ins. Co.*, 531 A.2d 717, 719 (N.J. 1987) (quoting *Senn v. J.S. Weeks & Co.*, 180 S.E.2d 336, 339 (S.C. 1971)).

87. *See* CAL. INS. CODE § 11580.2(b) (West 2005); MISS. CODE ANN. § 83-11-103 (2000).

88. *Mundey v. Erie Ins. Group*, 914 A.2d 1167 (Md. 2007); *Peterzell v. Gen. Ins. Co. of Am.*, No. CV95-32-68-70-S, 1996 Conn. Super. LEXIS 1946 (Conn. Super. Ct. July 22, 1996).

89. *Criterion Ins. Co. v. Anderson*, 347 So. 2d 384 (Ala. 1977); *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988); *Stuart v. Ins. Co. of N.*

recognized that any restriction on coverage must comport with the purpose and intent of the uninsured motorist statute. Policy conditions, restrictions, or limitations that are inconsistent with the statute's requirements are unenforceable as a matter of public policy.⁹⁰

Am., 730 P.2d 255 (Ariz. Ct. App. 1986); Oanh Thi Pham v. Allstate Ins. Co., 254 Cal. Rptr. 152 (Ct. App. 1988); Grissom v. Nationwide Mut. Ins. Co., 599 A.2d 1086 (Del. Ch. 1991); Smith v. Commercial Union Assurance Co., 268 S.E.2d 632 (Ga. 1980); Allstate Ins. Co. v. Kaneshiro, 998 P.2d 490 (Haw. 2000); Ind. Farmers Mut. Ins. Co. v. Speer, 407 N.E.2d 255 (Ind. Ct. App. 1980); Stewart v. Capps, 802 P.2d 1226 (Kan. 1990); Simon v. Cont'l Ins. Co., 724 S.W.2d 210 (Ky. 1986); Wescott v. Allstate Ins., 397 A.2d 156 (Me. 1979); State Farm Mut. Auto. Ins. Co. v. DeHaan, 900 A.2d 208 (Md. 2006); Lumbermens Mut. Cas. Co. v. Mercurio, 535 N.E.2d 234 (Mass. App. Ct. 1989); Reliance Ins. Co. v. Haney, 220 N.W.2d 728 (Mich. Ct. App. 1974); Miklas v. Parrott, 684 N.W.2d 458 (Minn. 2004); Atlanta Cas. Co. v. Payne, 603 So. 2d 343 (Miss. 1992); Mitchell v. State Farm Ins. Co., 68 P.3d 703 (Mont. 2003); Shaw v. City of Jersey City, 811 A.2d 404 (N.J. 2002); Rowell v. Utica Mut. Ins. Co., 571 N.E.2d 707 (N.Y. 1991); Hoffman v. Great Am. Alliance Ins. Co., 601 S.E.2d 908 (N.C. Ct. App. 2004); Thedin v. U.S. Fid. & Guar. Ins. Co., 518 N.W.2d 703 (N.D. 1994); Stanton v. Nationwide Mut. Ins. Co., 623 N.E.2d 1197 (Ohio 1993); Forbes v. Shelter Mut. Ins. Co., 904 P.2d 159 (Okla. Civ. App. 1995); Nationwide Mut. Ins. Co. v. Erwood, 611 S.E.2d 319 (S.C. Ct. App. 2005); Guarantee Ins. Co. of Tex. v. Boggs, 527 S.W.2d 265 (Tex. Civ. App. 1975); Hubbard v. Metro. Prop. & Cas. Ins. Co., 944 A.2d 891 (Vt. 2007); Hodges v. Perry, 43 Va. Cir. 340 (Cir. Ct. 1997); Plymale v. Adkins, 429 S.E.2d 246 (W. Va. 1993).

90. Essick v. Barksdale, 882 F. Supp. 365 (D. Del. 1995); Walker v. GuideOne Specialty Mut. Ins. Co., 834 So. 2d 769 (Ala. 2002); Employers Mut. Cas. Co. v. McKeon, 765 P.2d 513 (Ariz. 1988); Pardon v. S. Farm Bureau Cas. Ins. Co., 868 S.W.2d 468 (Ark. 1994); Daun v. USAA Cas. Ins. Co., 23 Cal. Rptr. 3d 44 (Ct. App. 2005); DeHerrera v. Sentry Ins. Co., 30 P.3d 167 (Colo. 2001); Gormbard v. Zurich Ins. Co., 904 A.2d 198 (Conn. 2006); First Nat'l Ins. Co. of Am. v. Devine, 211 So. 2d 587 (Fla. Dist. Ct. App. 1968); Nat'l Union Fire Ins. Co. v. Olson, 751 P.2d 666 (Haw. 1988); Moses v. Coronet Ins. Co., 549 N.E.2d 739 (Ill. App. Ct. 1989); Jackson v. Jones, 804 N.E.2d 155 (Ind. Ct. App. 2004); Lee v. Grinnell Mut. Reinsurance Co., 646 N.W.2d 403 (Iowa 2002); Stewart v. Capps, 802 P.2d 1226 (Kan. 1990); Nall v. State Farm Mut. Auto. Ins. Co., 406 So. 2d 216 (La. 1981); Flanagan v. Horace Mann Ins. Co., No. CV-03-001, 2003 Me. Super. LEXIS 207 (Me. Super. Ct. Sept. 10, 2003); Nationwide Mut. Ins. Co. v. Webb, 436 A.2d 465 (Md. 1981); Lumbermens Mut. Cas. Co. v. Mercurio, 535 N.E.2d 234 (Mass. App. Ct. 1989); Citizens Mut. Ins. Co. v. Jenks, 194 N.W.2d 728 (Mich. Ct. App. 1971); Marchio v. W. Nat'l Mut. Ins. Co., 747 N.W.2d 376 (Minn. Ct. App. 2008); Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658 (Miss. 1994); Thornburg v. Farmers Ins. Co., 859 S.W.2d 847 (Mo. Ct. App. 1993); Oberkramer v. Reliance Ins. Co., 650 S.W.2d 300 (Mo. Ct. App. 1983); Guiberson v. Hartford Cas. Ins. Co., 704 P.2d 68 (Mont. 1985); State Farm Mut. Auto. Ins. Co. v. Hildebrand, 502 N.W.2d 469 (Neb. 1993); Cont'l Ins. Co. v. Murphy, 96 P.3d 747 (Nev. 2004); Peerless Ins. Co. v. Vigue, 345 A.2d 399 (N.H. 1975); Mozee v. McGhee, 410 A.2d 46 (N.J. Super. Ct. App. Div. 1979); Padilla v. State Farm Mut. Auto. Ins. Co., 68 P.3d 901 (N.M. 2003); Brittain v. Progressive Preferred Ins. Co., No. 77440, 2000 Ohio App. LEXIS 5100 (Ohio Ct. App. Nov. 2, 2000); State Farm Auto. Ins. Co. v. Greer, 777 P.2d 941 (Okla. 1989); London v. Farmers Ins. Co., 63 P.3d 552 (Okla. Civ. App. 2002); Utica Mut. Ins. Co. v. Contrisciane, 473 A.2d 1005 (Pa. 1984); Nationwide Mut. Ins. Co. v.

II. ELEMENTS OF AN UNINSURED MOTORIST CLAIM

The Oklahoma Supreme Court has expressly renounced the gap coverage theory.⁹¹ This decision neither restricts nor broadens the court's discretion in interpreting the uninsured motorist statute. It merely leaves the court with one less layer of onion to peel when construing the public policy dictates of the Oklahoma Uninsured Motorist Act.

In Oklahoma, uninsured motorist coverage is mandatory in the sense that it must be offered in writing by the insurer and rejected in writing by the named insured.⁹² The insurer's statutory obligation to offer uninsured motorist coverage extends only to the statutory minimum amount of coverage.⁹³ If neither offered in writing by the insurer, nor rejected in writing by all named insureds⁹⁴ or consumer/lessees,⁹⁵ the statutory minimum amount of coverage is imputed by operation of law into the policy.⁹⁶

Three of the four requirements for determining whether an individual is entitled to uninsured motorist benefits emanate from the Oklahoma Uninsured Motorist Act.⁹⁷ The remaining requirement is contractual in

Viti, 850 A.2d 104 (R.I. 2004); *Grange Ins. Ass'n v. Hubbard*, 667 P.2d 121 (Wash. Ct. App. 1983); *Mitchell v. Broadnax*, 537 S.E.2d 882 (W. Va. 2000).

91. *GEICO Gen. Ins. Co. v. Nw. Pac. Indem. Co.*, 115 P.3d 856, 859 (Okla. 2005).

92. See *Boerstler v. Hoover*, 943 P.2d 614 (Okla. 1997); *May v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 918 P.2d 43 (Okla. 1996); *Robertson v. U.S. Fid. & Guar. Co.*, 836 P.2d 1294 (Okla. 1992); *Moon v. Guarantee Ins. Co.*, 764 P.2d 1331 (Okla. 1988).

93. *Cofer v. Morton*, 784 P.2d 67 (Okla. 1989).

[U]nless a named insured or applicant requests such coverage in writing, such coverage need not be provided in or supplemental to any renewal, reinstatement, substitute, amended or replacement policy where a named insured or applicant had rejected the coverage in connection with a policy previously issued to him by the insurer.

OKLA. STAT. tit. 36, § 3636(G) (Supp. 2008). The coverage must be re-offered, however, where a new vehicle is added to the policy. *Beauchamp v. Sw. Nat'l Ins. Co.*, 746 P.2d 673 (Okla. 1987). The statute "does not require that every [car] . . . in [a single] policy have a separate document that separately accepts or rejects [uninsured motorist] coverage for that [specific] vehicle." *Graham v. Travelers Ins. Co.*, 61 P.3d 225, 230 (Okla. 2002).

94. *Plaster v. State Farm Mut. Auto. Ins. Co.*, 791 P.2d 813 (Okla. 1989) (individual named insured who signed rejection cannot assert a claim for uninsured motorist proceeds).

95. *Moon v. Guarantee Ins. Co.*, 764 P.2d 1331 (Okla. 1988) (rental company's rejection of uninsured motorist coverage did not constitute rejection by lessee); *Sexton v. Cont'l Cas. Co.*, 816 P.2d 1135 (Okla. 1991).

96. *May v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 918 P.2d 43 (Okla. 1996).

97. Uninsured motorist coverage is a creature of statute. Therefore, "the provisions of [the] statutes are given force and effect as if written into the policy." *Gray v. Midland*

nature; however, it is subject to the same policy considerations attributed to the three statutory requirements. The statute in pertinent part provides that:

A. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person *arising out of the ownership, maintenance or use of a motor vehicle* shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.

B. The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the *protection of persons insured thereunder* who are *legally entitled* to recover damages from *owners or operators of uninsured motor vehicles and hit-and-run motor vehicles* because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured.⁹⁸

As suggested by the italicized language, an individual seeking uninsured motorist proceeds carries the burden of proving that:

1) the injured person is an insured under the [uninsured motorist] provisions of a policy; 2) the injury to the insured [was] caused by an accident; 3) the injury . . . [arose] out of the “ownership, maintenance or use” of a motor vehicle; and 4) the injured insured is “legally entitled to recover damages from the owner or operator of the uninsured motor vehicle.”⁹⁹

Risk Ins. Co., 925 P.2d 560, 562 (Okla. 1996) (quoting *Shepard v. Farmers Ins. Co.*, 678 P.2d 250, 251 (Okla. 1983)); *see also* *Graham v. Travelers Ins. Co.*, 61 P.3d 225 (Okla. 2002).

98. OKLA. STAT. tit. 36, § 3636(A)–(B) (Supp. 2008) (emphasis added).

99. *Ply v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 81 P.3d 643, 647 (Okla. 2003)

A. Injured Person is an Insured Under Uninsured Motorist Provision

The phrase *protection of persons insured thereunder*,¹⁰⁰ demonstrates that the mandatory offer of uninsured motorist coverage is tied to the sale of an underlying motor vehicle or automobile liability insurance policy.¹⁰¹ Thus, uninsured motorist coverage must be offered for purchase in conjunction with a motor vehicle or automobile liability policy.¹⁰² Because it is for the protection of “persons insured thereunder”¹⁰³ (i.e. liability coverage), uninsured motorist coverage is coextensive with liability coverage. Therefore, the definition of insured in the uninsured motorist coverage must be at least as broad as that in the liability section of the policy.¹⁰⁴ More significantly, uninsured motorist coverage stems “from falling within the definition of an ‘insured’ under

(footnotes omitted).

100. § 3636(B).

101. See *Keel v. MFA Ins. Co.*, 553 P.2d 153 (Okla. 1976); *Moon v. Guarantee Ins. Co.*, 764 P.2d 1331 (Okla. 1988).

102. See *Moser v. Liberty Mut. Ins. Co.*, 731 P.2d 406 (Okla. 1986) (OKLA. STAT. tit. 36, § 3636 applies only to automobile liability or motor vehicle liability policies); *GEICO Gen. Ins. Co. v. Nw. Pac. Indem. Co.*, 115 P.3d 856 (Okla. 2005).

103. § 3636(B).

104. Johnny Parker, *The Wacky World of Collision and Comprehensive Coverages: Intentional Injury and Illegal Activity Exclusions*, 79 NEB. L. REV. 75, 82–83 (2000); *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So. 2d 1294 (Ala. Civ. App. 1982); *Farmers Ins. Co. of Ariz. v. U.S. Fid. & Guar. Co.*, 912 P.2d 1354 (Ariz. Ct. App. 1995); *First Sec. Bank v. Doe*, 760 S.W.2d 863 (Ark. 1988); *Robles v. Cal. State Auto. Ass'n*, 145 Cal. Rptr. 115 (Ct. App. 1978); *Bernal v. Lumbermens Mut. Cas. Co.*, 97 P.3d 197 (Colo. Ct. App. 2003) (must offer co-extensive but policyholder may reject and accept narrower uninsured motorist coverage than liability); *Moncrease v. Sirius Am. Ins. Co.*, No. CV054015335S, 2007 Conn. Super. LEXIS 3003 (Conn. Super. Ct. Nov. 7, 2007); *Frank v. Horizon Assurance Co.*, No. 87C-AU-46, 1988 Del. Super. LEXIS 43 (Del. Super. Ct. Jan. 21, 1988); *Valiant Ins. Co., v. Webster*, 567 So. 2d 408 (Fla. 1990); *Ropar v. Travelers Ins. Co.*, 422 S.E.2d 34 (Ga. Ct. App. 1992); *Dawes v. First Ins. Co. of Haw.*, 883 P.2d 38 (Haw. 1994); *Pellegrini v. Jankoveck*, 614 N.E.2d 319 (Ill. App. Ct. 1993); *Ind. Farmers Mut. Ins. Co. v. Speer*, 407 N.E.2d 255 (Ind. Ct. App. 1980); *Kats v. Am. Family Mut. Ins. Co.*, 490 N.W.2d 60 (Iowa 1992); *Stewart v. Robinson*, 521 So. 2d 1241 (La. Ct. App. 1988); *Pappas v. Cent. Nat'l Ins. Group of Omaha*, 255 N.W.2d 629 (Mich. 1977); *Kaysen v. Fed. Ins. Co.*, 268 N.W.2d 920 (Minn. 1978); *Lair v. Am. Family Mut. Ins. Co.*, 789 S.W.2d 30 (Mo. 1990); *Allied Mut. Ins. Co. v. Action Elec. Co.*, 593 N.W.2d 275 (Neb. 1999); *Danner v. State Farm Mut. Auto. Ins. Co.*, 578 N.W.2d 902 (Neb. Ct. App. 1998); *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 488 P.2d 1151 (Nev. 1971); *Turner v. St. Paul Prop. & Liab. Ins. Co.*, 676 A.2d 109 (N.H. 1996); *Thedin v. U.S. Fid. & Guar. Ins. Co.*, 518 N.W.2d 703 (N.D. 1994); *Ameen v. Prudential Prop. & Cas. Ins. Co.*, 110 P.3d 86 (Okla. Civ. App. 2004); *De Smet Ins. Co. of S.D. v. Gibson*, 552 N.W.2d 98 (S.D. 1996); *Christenberry v. Tipton*, 160 S.W.3d 487 (Tenn. 2005).

any given" automobile or motor vehicle insurance policy and "not from owning an automobile."¹⁰⁵

Whether an individual is an insured under the terms of an automobile liability insurance contract depends entirely upon the provisions of the policy.¹⁰⁶ The parties to the policy are free to "agree upon the terms of the contract and are [at liberty] to limit or restrict [the] insurer's liability."¹⁰⁷ Liberty of contract, however, is not absolute; where the contract is ambiguous or violates public policy the court may look behind the agreement.¹⁰⁸ Automobile liability insurance provisions that define the term insured in such a manner as to exclude a specific or certain class of individuals are not invalid merely because they simultaneously deprive the aggrieved party of uninsured motorist coverage.¹⁰⁹ Contract language that excludes an individual from coverage as an insured under the uninsured motorist provisions of an insurance policy has been upheld on numerous grounds. For example, in *Shepard v. Farmers Insurance Co.*, the Oklahoma Supreme Court validated a clause that denied coverage to a relative of the insured living in the same household when such relative, or his/her spouse, owned an automobile, despite the fact that the provision operated to exclude the plaintiff from the definition of an insured.¹¹⁰ According to the court, the provision did not contravene the uninsured motorist law because of the presumption "that one who owns an automobile has recourse to some uninsured motorist benefits."¹¹¹ A similar result was reached in *O'Brien v. Dorrough*.¹¹² There the Oklahoma Court of Civil Appeals upheld the validity of a named-driver exclusion despite an absence of evidence

105. *State Farm Mut. Auto. Ins. Co. v. Wendt*, 708 P.2d 581, 586 (Okla. 1985) (quoting *Shepard v. Farmers Ins. Co.*, 678 P.2d 250, 252 (Okla. 1983)).

106. *Shepard*, 678 P.2d at 251; *O'Brien v. Dorrough*, 928 P.2d 322, 324 (Okla. Civ. App. 1996); *Babcock v. Adkins*, 695 P.2d 1340, 1342 (Okla. 1984).

107. *Shepard*, 678 P.2d at 251.

108.

In Oklahoma, a contract violates public policy only if it clearly tends to injure public health, morals or confidence in administration of law, or if it undermines the security of individual rights with respect to either personal liability or private property. Courts will exercise their power to nullify contracts made in contravention of public policy only rarely, with great caution and in cases that are free from doubt.

Id. (internal citations omitted).

109. *See id.* at 251; *O'Brien*, 928 P.2d at 324-25.

110. *Shepard*, 678 P.2d at 252.

111. *Id.* at 252-53.

112. *O'Brien*, 928 P.2d at 324-25.

regarding whether the aggrieved party owned a car which would give rise to the presumption of recourse to uninsured motorist coverage.¹¹³ Because, in the context of liability insurance, the named-driver exclusion serves a valid purpose—keeping insurance premiums affordable—and since an insured could refuse uninsured motorist coverage all together, the *O'Brien* court refused to hold that an exclusion, which excluded only one named individual, violated public policy.¹¹⁴

While insurers may contractually assume a liability in respect to uninsured motorist coverage broader than that required by statute, “once a person is insured under an uninsured motorist policy, subsequent exclusions inserted by the insurer in the policy . . . which dilute and impermissively limit uninsured motorist coverage are void as violative of the public policy espoused by 36 O.S. 1981 § 3636.”¹¹⁵ Likewise, any provision in an insurance policy which ties uninsured motorist coverage to a specific vehicle rather than a person is also void.¹¹⁶

Individuals coming within the definition of insured under the uninsured motorist provision of an insurance policy are accorded distinct rights on the basis of their status. Because the liability coverage omnibus clause¹¹⁷ generally provides coverage to others on the basis of their relationship with the named insured, spouses and resident relatives of the named insured’s household are accorded the status of “Class 1 insureds.”¹¹⁸ The liability coverage omnibus clause “also extends coverage to anyone driving the insured vehicle with the expressed or general permission of the named insured. Permission, for purposes of extended coverage, may be expressed or implied.”¹¹⁹ Therefore, permissive users are denominated in the uninsured motorist coverage as “Class 2 insureds.”¹²⁰

Occupants are also classified as class 2 insureds.¹²¹ The classification is derived from insurance policy provisions that define the

113. *Id.* at 325–26.

114. *Id.* at 326.

115. *State Farm Mut. Auto. Ins. Co. v. Wendt*, 708 P.2d 581, 583 (Okla. 1985).

116. *Id.*

117. “‘Omnibus clause’ is a term of art frequently used in discussions of coverage provisions but rarely employed in insurance contracts.” Parker, *supra* note 104, at 81. For a detailed discussion of omnibus coverage and how legislatures have mandated their inclusion in every automobile or motor vehicle liability policy see *id.* at 81 & n.18.

118. *Rogers v. Goad*, 739 P.2d 519, 521 (Okla. 1987).

119. Parker, *supra* note 104, at 83, 85; see also *id.* at 81 & n.18.

120. *Rogers*, 739 P.2d at 521.

121. *Id.*

term insured as either: (1) “[a]nyone ‘occupying’ a covered auto”¹²² or (2) “anyone occupying, with your permission, a car we insure.”¹²³ In either instance, the word “occupying” is defined in the respective policy to mean “in, upon, getting in, on, or off” the covered auto.¹²⁴

Because the words in, upon, getting in, on, or off are very general and their meaning often depends upon the context and circumstances surrounding their use, defining who is an insured in terms of his occupancy of a covered vehicle is very problematic.¹²⁵ For example, in *Wickham v. Equity Fire & Casualty Co.*, the plaintiff, Curtis Wickham, stopped to help Christopher McClain, the owner and operator of a vehicle that had lost its left rear wheel while being driven.¹²⁶ “Wickham and McClain searched McClain’s trunk by the . . . glow of a cigarette lighter to find the necessary tools” to reattach the wheel.¹²⁷ As Wickham was kneeling next to the car, in the process of tightening the last lug nut to remount the wheel, a car driven by James Wade struck and seriously injured Wickham.¹²⁸

“Wickham . . . sued McClain’s insurer, Equity Fire and Casualty Company . . . , asserting [that he was] entitled to recover on the uninsured motorist coverage” of McClain’s automobile policy.¹²⁹ Equity denied coverage contending that Wickham was not an insured under the uninsured motorist coverage because he was not occupying the vehicle at the time of his injury.¹³⁰ According to Equity, Wickham was neither in, upon, getting in, on, or off the covered auto.¹³¹

In *Wickham*, the court refused to adopt a bright-line test for determining whether someone was occupying “a vehicle for purposes of [uninsured motorist] coverage.”¹³² Instead, the court concluded that the question of whether the policy definition of “occupying” has been

122. *Transcon. Ins. Co. v. Lemons*, No. CIV-05-1235-C, 2006 U.S. Dist. LEXIS 44521 (W.D. Okla. June 28, 2006) (discussing the insurance policy language).

123. *Wickham v. Equity Fire & Cas. Co.*, 889 P.2d 1258 (Okla. Civ. App. 1994) (discussing the insurance policy language) (footnote omitted).

124. *Lemons*, 2006 U.S. Dist. LEXIS 44521, at *7; *see also Wickham*, 889 P.2d at 1260.

125. *See Wickham*, 889 P.2d at 1260.

126. *Id.* at 1259.

127. *Id.*

128. *Id.*

129. *Id.* at 1260 (footnote omitted).

130. *Id.* at 1260–61.

131. *Id.* at 1261.

132. *Id.*

satisfied should be made on a case-by-case basis, "depending on the circumstances of the accident, the use of the vehicle, the relevant terms of the coverage at issue, and any . . . public policy considerations."¹³³ For these reasons, the court concluded that Wickham came within the policy definition of "occupying."¹³⁴

Because uninsured motorist coverage follows the person and not the vehicle, a class 1 insured is entitled to the benefits of all uninsured motorist coverage for which she has paid premiums.¹³⁵ The contractual expectation of the person paying separate premiums on multiple vehicles justifies allowing a named insured to aggregate the uninsured motorist coverage of every vehicle she owns, even those not involved in the accident, up to the limits of her injury.¹³⁶ Conversely, those qualifying as class 2 insureds lack the contractual expectation of a named insured and are restricted to the single-limit coverage of the vehicle they were located in at the time of injury.¹³⁷ A class 2 insured may, however, obtain the single-limit uninsured motorist proceeds of the vehicle she was located in when injured, in addition to the uninsured motorist coverage of her personal automobile insurance policy which was not involved in the accident.¹³⁸

A class 2 insured may also recover the policy limits of both the

133. *Id.*

134. *Id.*

135. *Babcock v. Adkins*, 695 P.2d 1340 (Okla. 1984); *Keel v. MFA Ins. Co.*, 553 P.2d 153 (Okla. 1976); *Richardson v. Allstate Ins. Co.*, 619 P.2d 594 (Okla. 1980). In Oklahoma, insurers are not statutorily required to offer stackable uninsured motorist coverage. Consequently, the parties may agree in the contract to limit the insurer's liability to a single uninsured motorist coverage. Such an agreement is not against public policy when only one premium is charged for multiple vehicles and it unambiguously reflects the insured's intent to preclude stacking. See *Scott v. Cimarron Ins. Co.*, 774 P.2d 456 (Okla. 1989); *Spears v. Glens Falls Ins. Co.*, 114 P.3d 448 (Okla. 2005).

136. *Babcock*, 695 P.2d 1340; *Keel*, 553 P.2d 153; *Richardson*, 619 P.2d 594; *Aetna Cas. & Sur. Co. v. Craig*, 771 P.2d 212 (Okla. 1989) (class 1 insured may stack the uninsured motorist coverages of a commercial fleet policy).

137. A class 1 insured occupying her own covered vehicle as a passenger retains the rights accorded to her class 1 status. Occupants or passengers in an insured motorist's vehicle involved in an accident, who are entitled to uninsured motorist coverage solely because of their status as passengers, may not stack the uninsured motorist coverage under separate policies purchased by the owner of the involved vehicle for a noninvolved vehicle or vehicles unless those passengers also qualify as insureds under those separate policies. See *Babcock*, 695 P.2d at 1343; see also *Craig*, 771 P.2d 212; *Rogers v. Goad*, 739 P.2d 519 (Okla. 1987) (class 2 insureds may not stack the uninsured motorist coverage of a commercial fleet policy).

138. *Torres v. Kan. City Fire & Marine Ins. Co.*, 849 P.2d 407 (Okla. 1993); *Stanton v. Am. Mut. Liab. Ins. Co.*, 747 P.2d 945, 947 (Okla. 1987).

liability and uninsured motorist coverages of the vehicle involved in the accident. For example, in *Heavner v. Farmers Insurance Co.*,¹³⁹ the plaintiff, while a passenger in a car driven by Carlos Sturms, was injured in an accident with another automobile. Sturms was insured by appellees, Farmers Insurance Company, Inc. and Farmer's Insurance Group ("Farmers"). Farmers admitted liability and filed an interpleader action naming as defendants, plaintiff and the occupants of the other vehicle.¹⁴⁰ Farmers also deposited with the court Sturms' entire \$20,000 liability coverage, which was divided among all the passengers.¹⁴¹ Heavner "was awarded \$4,500.00 of the \$20,000.00 liability coverage available for distribution."¹⁴²

After the liability coverage was exhausted, Plaintiff subsequently commenced an action "to recover under the uninsured motorist provisions of Sturms' policy and under similar provisions of a policy issued by American Deposit Insurance Company, . . . [owned by his] sister-in-law with whom he resided."¹⁴³ Following a ruling in favor of Farmers, the plaintiff appealed asserting that he was entitled "to 'stack' the liability and uninsured motorist coverage under the same Farmer's policy."¹⁴⁴ The parties agreed that appellant, Heavner, was "an insured because he was occupying an insured motor vehicle."¹⁴⁵

The court in *Heavner*, construing the 1976 version of the Oklahoma Uninsured Motorist Act, found that Sturms' vehicle was an uninsured motor vehicle "[b]ecause the liability insurer (Farmers) [was] not legally required to pay at least the per person coverage limits (\$10,000.00) with respect to the legal liability of its insured."¹⁴⁶ Since Farmers paid "only \$4,500.00 under the liability coverage while the per person uninsured motorist coverage limit of the Farmers policy applicable to [Heavner was] \$10,000.00. [Heavner was] entitled to receive \$5,500.00 from Farmers under the uninsured motorist coverage."¹⁴⁷ In considering Heavner's claim against American Deposit Insurance Company, the court noted that § 3636 expanded uninsured motorist coverage to include

139. *Heavner v. Farmers Ins. Co.*, 663 P.2d 730 (Okla. 1983).

140. *Id.* at 731.

141. *See id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 732.

147. *Id.*

instances “when an injured party’s uninsured motorist coverage is greater than the tortfeasor’s liability coverage.”¹⁴⁸ Because only \$4,500 of Farmers’ “liability coverage was available to [Heavner] and American’s uninsured motorist coverage of \$5,000.00 exceed[ed] that by \$500.00,” appellant was entitled to that amount from American.¹⁴⁹ The right of insured passengers to recover both the liability and uninsured motorist limits of the same policy has not been lost in subsequent amendments of the Oklahoma Uninsured Motorist Act.¹⁵⁰ Because “[t]he same laws and public policies underlying uninsured motorists coverage extend to underinsured motorist coverage as well,”¹⁵¹ the precedential value of *Heavner* and its progeny is not diminished by the fact that they involved underinsured motorist disputes.

Despite its inextricable link to liability coverage, uninsured motorist insurance is a distinct, hybrid form of insurance. The very nature of liability insurance coverage is different from uninsured motorist coverage. The former protects the covered person from the consequences of their own negligence; the latter protects covered parties from the consequences of the negligence of others. This distinction, however, is of no consequence when determining the rights of an insured to sue an insurer for breach of its implied duty of good faith and fair dealing.

An insurer’s duty of good faith and fair dealing “does not extend to every individual entitled to the insurance proceeds. Rather, the implied duty of good faith and fair dealing extends only to those persons sharing a contractual or statutory relationship with the insurer.”¹⁵² Thus, “only individuals in a contractual or statutory relationship with the insurer have standing to sue for bad faith.”¹⁵³ “In the absence of a contractual or statutory relationship, there is no duty which can be breached.”¹⁵⁴ Therefore, third-party claimants who are strangers to the insurance policy lack standing to assert a bad faith action against an insurer.¹⁵⁵

Class 1 insureds obviously satisfy the requirements for standing to

148. *Id.* (quoting *Mid-Continent Cas. Co. v. Theus*, 592 P.2d 519, 520 (Okla. 1979)).

149. *Id.*

150. *See, e.g.*, *GEICO Gen. Ins. Co. v. Nw. Pac. Indem. Co.*, 115 P.3d 856 (Okla. 2005); *Lewis v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 535 (Okla. Civ. App. 1992).

151. *Lewis*, 838 P.2d at 538.

152. Johnny C. Parker, *The Development of First-Party Extracontractual Insurance Litigation in Oklahoma: An Analytical Examination*, 31 TULSA L.J. 57, 69 (1995).

153. *Id.*

154. *Allstate Ins. Co. v. Amick*, 680 P.2d 362, 364 (Okla. 1984).

155. *Id.* at 364–65.

bring a bad faith claim against their insurer.¹⁵⁶ The answer to the question of whether a class 2 insured possessed standing to assert a bad faith claim against an uninsured motorist carrier was less obvious until the Oklahoma Supreme Court's decision in *Townsend v. State Farm Mutual Automobile Insurance Co.*¹⁵⁷ Therein, the court applied the contractual or statutory relationship test to determine whether a class 2 insured had standing to assert a bad faith claim against an uninsured motorist carrier.¹⁵⁸ According to the court in *Townsend*, because the named insured, Penn, purchased uninsured motorist protection for himself, family members, permissive users and passengers, a class 2 insured had "a legitimate contractual expectation that the insurer would act in good faith and deal fairly with all insureds."¹⁵⁹ Furthermore, because subsection B of the Uninsured Motorist Act "requires insurers to offer uninsured motorist coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles[,] . . . the legislature established a statutory relationship between [uninsured motorist carriers] and all insureds."¹⁶⁰

B. Injury to Insured was Caused by an Accident

The objective of uninsured motorist insurance "is to protect the insured from the effects of personal injury resulting from an accident with another motorist who carries no insurance or is underinsured."¹⁶¹ The requirement that the injury to insured was "caused by an accident" is traceable to the insuring agreement provisions of liability and uninsured motorist coverages.¹⁶² The typical uninsured motorist coverage provision provides:

PART C—UNINSURED MOTORISTS COVERAGE

156. *Newport v. USAA*, 11 P.3d 190 (Okla. 2000); *Brown v. Patel*, 157 P.3d 117 (Okla. 2007).

157. *Townsend v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 236 (Okla. 1993).

158. *Id.* at 237–38.

159. *Id.* at 238.

160. *Id.*

161. *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 683–84 (Okla. 1983).

162. The phrase "caused by accident" is construed in the same manner for purposes of determining both liability and uninsured motorist coverage. *Compare* *U.S. Fid. & Guar. Co. v. Briscoe*, 239 P.2d 754 (Okla. 1951), *and* *Penley v. Gulf Ins. Co.*, 414 P.2d 305 (Okla. 1966), *with* *Stucky v. Long*, 783 P.2d 500 (Okla. Civ. App. 1989).

INSURING AGREEMENT

A. We will pay compensatory damages which an “insured” is legally entitled to recover from the owner or operator of an “uninsured motor vehicle” because of “bodily injury”:

1. Sustained by an “insured”; and
2. Caused by accident.

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the “uninsured motor vehicle.”¹⁶³

Because an insurance policy is a contract, it is construed as every other contract.¹⁶⁴ Accordingly,

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed.¹⁶⁵

The initial inquiry, in a dispute over the meaning of language in an insurance policy, is to determine whether the policy language at issue is ambiguous.¹⁶⁶ If not ambiguous the word or phrase is accorded its plain, ordinary meaning in the popular sense.¹⁶⁷ Likewise, because the phrase “caused by accident” is typically not defined in the policy, courts have

163. Insurance Services Office, Inc., Personal Auto Policy PP 00 01 06 98, at 5 (1997), available at <http://www.scc.virginia.gov/division/boi/webpages/inspapedocs/sfppp00016h.pdf>.

164. Wiley v. Travelers Ins. Co., 534 P.2d 1293, 1295 (Okla. 1974).

165. OKLA. STAT. tit. 15, § 160 (2001).

166. Wynn v. Avemco Ins. Co., 963 P.2d 572, 575 (Okla. 1998).

167. McDonald v. Schreiner, 28 P.3d 574, 577 (Okla. 2001).

The absence of an express definition of a word within the policy does not necessarily render the word ambiguous. Similarly, the fact that a word cannot be precisely defined to make clear its application in every factual situation does not mean the word is ambiguous. Rather, the test to be applied in determining whether a word is ambiguous is whether the word “is susceptible to two interpretations” on its face.

Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 706 (Okla. 2002) (quoting Littlefield v. State Farm Fire & Cas. Co., 857 P.2d 65, 69 (Okla. 1993)) (citations omitted).

not accorded it a technical legal meaning.¹⁶⁸ Undefined terms are treated like unambiguous terms and accorded their ordinary and usual meaning.¹⁶⁹ Dictionaries are often used by courts to determine the plain, ordinary, and usual meaning of an undefined term.

The debate over the meaning of the phrase "caused by accident," in the context of uninsured motorist coverage, was put to rest by the Oklahoma Supreme Court in *Willard v. Kelley*.¹⁷⁰ Therein, George Willard, while on patrol as a police officer, spotted a vehicle driven by a suspected armed robber, Mark Kelley.¹⁷¹ When "Willard attempted to stop [Kelley], a chase ensued. After colliding with [several] cars, Kelley's [car] came to a [stop]."¹⁷² Willard stopped the police car and drew his weapon as he stepped from beside the squad car.¹⁷³ He then heard and felt the effect of a gunshot and ducked behind the squad car door as Kelley fired more bullets from his automobile.¹⁷⁴ Several of Kelley's bullets penetrated the squad car's door and struck Willard.¹⁷⁵

Willard and his wife sued both Kelley and Prudential Property and Casualty Insurance Company—their personal automobile insurance carrier.¹⁷⁶ From Prudential "they sought to recover the limits of the policy's uninsured motorist . . . coverage."¹⁷⁷ Prudential argued that coverage was afforded neither by the uninsured motorist statute nor by the policy because the injurious event was not an accident which arose out of the use of an uninsured automobile.¹⁷⁸

168. See *Penley v. Gulf Ins. Co.*, 414 P.2d 305 (Okla. 1966). If a term is specifically defined in an insurance policy, courts will normally look to that definition to determine its meaning. However, for the contract definition to control, it must be reasonably clear and unambiguous.

169. See *Flitton v. Equity Fire & Cas. Co.*, 824 P.2d 1132, 1134 (Okla. 1992) (undefined terms or words in an insurance policy, if unambiguous, must be accepted in their ordinary and popular sense).

170. *Willard v. Kelley*, 803 P.2d 1124 (Okla. 1990).

171. *Id.* at 1125–26.

172. *Id.* at 1126.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* The policy provision provided:

"[Insurer is obligated] [t]o pay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile. . . ."

According to the court, the character of the injurious event for purposes of determining whether it constitutes an accident should be evaluated from the perspective of the insured.¹⁷⁹ The reasonable person standard is used to assess the character of the injurious events from the insured's perspective.¹⁸⁰ Consequently, "even if [the] insured [is] the victim of an intentional [or criminal] act, the nature of the injury is nonetheless viewed as accidental, so long as the harm was not the reasonably foreseeable result of the insured's own . . . misconduct."¹⁸¹ Thus,

in the absence of a contrary provision, an automobile insurance policy which includes uninsured motorist and medical payments coverage as well as insures against injuries "caused by accident," does afford protection for harm that is unprovoked, unforeseen, and unintended on the part of the insured.¹⁸²

C. Injury Arising Out of the Ownership, Maintenance, or Use of a Motor Vehicle

The phrase "arising out of the ownership, maintenance or use of a motor vehicle[.]" as used in the Uninsured Motorist Act, is rooted in the coverage of the liability insurance policy that serves as the foundation for the required mandatory offer of uninsured motorist coverage.¹⁸³ As used in the liability provision of an automobile insurance policy, the phrase can cover a broad range of factual events.¹⁸⁴ However, the uninsured motorist statute restricts coverage to damages an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle which "aris[e] out of the ownership, maintenance or use of a motor vehicle."¹⁸⁵ Thus, the range of factual events that come within the protection afforded by uninsured motorist coverage are statutorily limited to situations involving an owner or operator of an uninsured motor

Id. (quoting the insurance policy) (added emphasis omitted).

179. *Id.* at 1128–29.

180. *Id.* at 1129.

181. *Id.*

182. *Id.* (emphasis omitted).

183. *Safeco Ins. Co. of Am. v. Sanders*, 803 P.2d 688, 690 (Okla. 1990) (quoting OKLA. STAT. tit. 36, § 3636 (1981)).

184. *Id.* at 691.

185. OKLA. STAT. tit. 36, § 3636(A) (Supp. 2008).

vehicle.¹⁸⁶

In *Safeco Insurance Co. of America v. Sanders*, Laura Sanders and Michael Houghton were seated in a 1967 Oldsmobile Cutlass in a parking lot when they were subdued by Scott Hain and Robert Lambert.¹⁸⁷ "Hain and Lambert forced Sanders to drive. After driving for a period of time, Sanders was [instructed] to stop."¹⁸⁸ Houghton was ordered out of the car, robbed of his money and truck keys, tied up, and locked in the trunk of the car.¹⁸⁹ Hain or Lambert then drove the car, stopped, and locked Sanders in the trunk with Houghton.¹⁹⁰ At some juncture, the car was driven to an isolated area.¹⁹¹ With Sanders and Houghton still in the trunk, Hain and Lambert cut the fuel line of the car and ignited it.¹⁹² "Sanders and Houghton died as a result of thermal burns and smoke inhalation."¹⁹³

The 1967 Oldsmobile Cutlass was insured by Safeco under a policy with William Sanders—Laura's father.¹⁹⁴ Houghton owned a 1985 Isuzu truck insured by Aetna.¹⁹⁵ An uninsured motorist claim was submitted to Safeco and subsequently denied.¹⁹⁶ Safeco then filed a declaratory judgment action in federal district court.¹⁹⁷ Based on the foregoing facts, the United States District Court for the Northern District of Oklahoma certified the following questions to the Oklahoma Supreme Court:¹⁹⁸

1. Does the murder of Sanders and Houghton when they were murdered by being burned to death in the trunk of the automobile in question "arise out of the . . . use of a motor vehicle" as contemplated by 36 O.S. 1981, § 3636? . . .
2. If the deaths arose out of the use of a motor vehicle, was there a causal connection between the use of the vehicle and the murders? . . .

186. *Sanders*, 803 P.2d at 691.

187. *Id.* at 689.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 689–90.

3. If the causal connection existed, do the acts of Hain and Lambert after the car was parked, constitute acts of independent significance to sever any causal link? . . .
4. Were Hain and Lambert “operators of (an) uninsured motor vehicle” when they set the vehicle on fire and murdered Sanders and Houghton?¹⁹⁹

According to the Oklahoma Supreme Court, “in ascertaining the scope of the mandated UM coverage ‘arising out of the use of a motor vehicle’ and ‘caused by’ or causal connection are not synonymous.”²⁰⁰ Causal connection is a question of fact.²⁰¹ So, if the facts establish that a motor vehicle or any part of a motor vehicle is the dangerous instrumentality that triggered the chain of events leading to injury, the injury arose out of the use of the motor vehicle as contemplated by the uninsured motorist statute.

The inquiry however, does not stop there. If the injury arose out of the use of a motor vehicle, the proof must also establish a causal connection between the motoring or transportation use of the vehicle by an uninsured motorist and the injury to the insured.²⁰² The determination of whether a causal connection exists between the transportation use and the injury is made on the basis of a two prong test: “1) is a use of the vehicle connected to the injury; and, 2) is that use related to the transportation nature of the vehicle.”²⁰³ Only uses that are related to the transportation purpose of a motor vehicle and that cause harm are causally connected to the injury for purposes of uninsured motorist coverage.²⁰⁴ In order to satisfy the causal connection requirement, the evidence must establish “that the acts of [the] uninsured motorist, which were related to the transportation nature of the motor vehicle, resulted in or contributed to the injury.”²⁰⁵ Ultimately, whether a use of an uninsured motor vehicle is related to the transportation nature

199. *Id.* at 690.

200. *Id.* at 691. Strict application of tort law is not required when courts decide causal connection in an insurance dispute between uninsured motorist carriers and their insureds. *Uptegraft v. Home Ins. Co.*, 662 P.2d 681 (Okla. 1983).

201. *Sanders*, 803 P.2d at 692.

202. *Id.* at 694.

203. *Id.* at 692.

204. *See Sanders*, 803 P.2d 688; *Mayer v. State Farm Mut. Auto. Ins. Co.*, 944 P.2d 288 (Okla. 1997).

205. *Sanders*, 803 P.2d at 695.

of the vehicle is a question of fact.²⁰⁶

However, the causal relationship, once established, may be severed. As observed by the Oklahoma Supreme Court in *Safeco*,

the acts of cutting the fuel line and igniting the fuel after the car was parked, which caused the car to burn, are so contrary to its transportation nature of the vehicle that, as a matter of law, these events are not related to its transportation nature and injury resulting therefrom is not within the UM coverage mandated by § 3636.²⁰⁷

Severance occurs only if the intervening force is unforeseeable from the perspective of the original tortfeasor.²⁰⁸

Uninsured motorist disputes based on an injury arising out of the maintenance of an uninsured motor vehicle are subjected to the same analytical framework as disputes involving injury arising out of the use of an uninsured motor vehicle.²⁰⁹ The word "maintenance" is to be accorded its ordinary literal meaning.²¹⁰ When added to the words "arising out of," the word takes on a broad, general, and comprehensive meaning.²¹¹ This meaning is broad enough to include situations where the injury resulted from a noncontemporaneous negligent maintenance of an uninsured motor vehicle.²¹²

D. Insured is Legally Entitled to Recover Damages from the Owner or Operator of the Uninsured Motor Vehicle

1. Legally Entitled to Recover

An action for uninsured motorist coverage is contractual in nature.²¹³

206. *Id.* at 693. The fact-sensitive nature of the causal-connection inquiry broadens the number of factual circumstances that might occur under circumstances that would arise out of a vehicle's use. See *Byus v. Mid-Century Ins. Co.*, 912 P.2d 845 (Okla. 1996); *Willard v. Kelley*, 803 P.2d 1124 (Okla. 1990); *Hulsey v. Mid-Am. Preferred Ins. Co.*, 777 P.2d 932 (Okla. 1989).

207. *Sanders*, 803 P.2d at 695.

208. *Byus*, 912 P.2d at 847-48.

209. *Ply v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 81 P.3d 643 (Okla. 2003).

210. *Id.* at 649 n.13.

211. *Id.* at 649-50.

212. *Id.* at 650.

213. *Uptegraft v. Home Ins. Co.*, 662 P.2d 681 (Okla. 1983). Because the nature of an uninsured motorist dispute is inherent *ex contractu*, an action for recovery of uninsured

Consequently, an insured's rights against an uninsured motorist provider arise from the contract rather than in tort.²¹⁴ Uninsured motorist insurance disputes combine tort liability and contract liability into one action. The obligation of the uninsured motorist to respond in money damage is governed by tort law and that of the insurer is governed by contract. The contractual nature of uninsured motorist coverage also precludes an insurer from stepping into the shoes of the tortfeasor in determining its liability under the uninsured motorist provision of the policy.²¹⁵ Uninsured motorist coverage is first-party coverage which reflects an insurer's promise to indemnify its insured for injuries caused by another.²¹⁶ In this context, "'legally entitled to recover' simply mean[s] that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages."²¹⁷ It does not require the insured to prove every element of a viable tort claim against the uninsured motorist.²¹⁸ "Legally entitled to recover" requires that there be a culpable tortfeasor—"someone who has committed a wrong from which the insured has suffered damage, before uninsured motorist coverage can come into play."²¹⁹ The phrase merely exemplifies the tort aspect of the uninsured motorist claim.

2. Owner or Operator

The uninsured motorist statute recognizes two groups of persons from whom an injured insured may be legally entitled to recover: (1) owners of uninsured motor vehicles; or (2) operators of uninsured

motorist benefits is governed by the statute of limitations applicable to contracts. *Id.* at 683. The statute of limitations on an action for uninsured motorist benefits begins to run when the insurance contract is breached and not when the accident occurred. *Wille v. GEICO Cas. Co.*, 2 P.3d 888, 892 (Okla. 2000).

214. *Barfield v. Barfield*, 742 P.2d 1107 (Okla. 1987).

215. *Uptegraft*, 662 P.2d 681; *Barfield*, 742 P.2d 1107.

216. *Uptegraft*, 662 P.2d at 683–86.

217. *Id.* at 685.

218. *Id.*

219. *Martin v. Hartford Underwriters Ins. Co.*, 918 P.2d 49, 51 (Okla. 1996) (three-year-old child found too young to form culpability required to satisfy the "legally entitled to recover" requirement of uninsured motorist statute); *see also Ply v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 81 P.3d 643, 649 (Okla. 2003) ("employer may be at fault within the meaning of phrase 'legally entitled to recover . . .,' where a supervisor, acting [in the scope of his employment], provides [flawed] or negligent instructions . . . to an employee [regarding] the use of an employer-owned motor vehicle and the employee is injured while following [those] instructions.").

vehicles.²²⁰ The uninsured motorist statute neither defines nor provides guidance for interpretation of the terms owner or operator. Both are common terms and should be construed in their ordinary sense. In this context, the term “operator” has been construed to mean “one that produces a physical effect or engages himself in the mechanical aspect of any process or activity.”²²¹ This definition is broad enough to include “any person who is engaged in activity related to the transportation nature of the vehicle.”²²² Thus, a driver or nondriver/passenger, who is in a position to exercise meaningful or coercive control over the driver comes within the definition of the word operator.²²³

The owner of an uninsured motor vehicle is subject to the same liability exposure as an operator. This is true even if no vehicle or person, other than the insured, is present at the time of the injury.²²⁴ The statutory language “legally entitled to recover damages” clearly references the tort aspect of an uninsured motorist claim. This language is modified by the prepositional phrase, “from owners or operators,”²²⁵ indicating the parties against whom there is a right to recover in tort. Thus, the insured must prove that he is entitled to bring a tort claim for damages against the owner or operator of an uninsured motor vehicle. The owner or operator’s liability for damages must however arise “out of the ownership, maintenance or use of” an uninsured motor vehicle.²²⁶

3. Uninsured Motor Vehicle

Oklahoma’s uninsured motorist “statute does not precisely define the term *uninsured motor vehicle*.”²²⁷ It merely provides that:

C. For the purposes of this coverage the term “uninsured motor vehicle” shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect

220. OKLA. STAT. tit. 36, § 3636(B) (Supp. 2008).

221. *Safeco Ins. Co. of Am. v. Sanders*, 803 P.2d 688, 696 (Okla. 1990) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE 1581 (UNABRIDGED 1961)); see also *Byus v. Mid-Century Ins. Co.*, 912 P.2d 845, 848 (Okla. 1996).

222. *Sanders*, 803 P.2d at 696.

223. *Byus*, 912 P.2d at 848.

224. *Ply*, 81 P.3d at 648.

225. § 3636(B).

226. § 3636(A).

227. *Gates v. Eller*, 22 P.3d 1215, 1218 (Okla. 2001).

to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term “uninsured motor vehicle” shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other.²²⁸

Subsection C recognizes that a motor vehicle with liability insurance can constitute an uninsured motor vehicle—(1) where the liability carrier of an insured vehicle is unable to make payment because of insolvency; or (2) the liability limits of the tortfeasor are less than the amount of the claim—i.e., underinsured.²²⁹ The definitions provided in subsection C must be read in conjunction with subsection B which expands the definition to also include vehicles with no liability coverage—and hit-and-run motor vehicles.²³⁰ Oklahoma’s uninsured motorist statute does not specifically exclude any class of vehicles from the definition of uninsured motor vehicle. Consequently, policy definitions that limit uninsured motorist coverage by defining the term uninsured motor vehicle restrictively are void and unenforceable.²³¹ Nevertheless, the definitions of uninsured motor vehicle included in sections B and C of the uninsured motorist statute focus on the vehicle.

The injured insured carries the burden of proving that the other vehicle was uninsured unless the insurer contractually assumed the burden of proof.²³² An insured motor vehicle does not become an uninsured motor vehicle merely because the statute of limitations expires on the tort claim causing the tortfeasor’s liability insurance to become unavailable.²³³ However, an insured motor vehicle is deemed to be an uninsured motor vehicle when it is driven by a nonpermissive uninsured

228. § 3636(C).

229. In the context of an underinsured motor vehicle, the insured is not required to get an adjudication of damages from the tortfeasor prior to seeking the uninsured motorist proceeds. *Lamfu v. GuideOne Ins. Co.*, 131 P.3d 712, 715 (Okla. Civ. App. 2005). However, the claim must be supported by evidence establishing a prima facie right to recover. *Id.* Bare allegations of the existence of unliquidated damages for pain and suffering are not sufficient proof of the uninsured status of the vehicle. *Id.*

230. See *Tidmore v. Fullman*, 646 P.2d 1278 (Okla. 1982).

231. *State Farm Auto. Ins. Co. v. Greer*, 777 P.2d 941 (Okla. 1989); *Brown v. United Servs. Auto. Ass’n*, 684 P.2d 1195 (Okla. 1984).

232. *Gates v. Eller*, 22 P.3d 1215 (Okla. 2001); *Brown*, 684 P.2d 1195.

233. *Gates*, 22 P.3d at 1220.

operator.²³⁴ Decisional law also suggests that an insured motor vehicle is uninsured when involved in an accident while being driven by an uninsured permissive operator.²³⁵ The case law definitions focus on the status of the owner or operator. Because the statutory and decisional law definitions encompass both the vehicle and owners/operators, respectively, it is impossible to determine which aspect of the statutory language, "who are legally entitled to recover damages from owners or operators,"²³⁶ is dispositive of whether a vehicle is uninsured. Consequently, the meaning of the statutory language "uninsured motor vehicle" is subject to the court's broad discretion, constrained only by the legislative intent and purpose of the statute.²³⁷ Regardless of the reason for classifying the vehicle as uninsured, the uninsured motorist carrier's obligations to the insured are the same.²³⁸

Evidence in place, an injured insured may assert his uninsured motorist claim pursuant to any one of the following four options:

- (1) He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.
- (2) He may file an action joining both the uninsured motorist and the insurance company as party defendants and litigate all issues of liability and damages in one action.
- (3) He may file an action against the uninsured motorist without joining the insurance company as a party defendant, but give adequate notice of the filing and pendency of such action to the insurance company so they take whatever action they desire, including intervention.

234. *Safeco Ins. Co. of Am. v. Sanders*, 803 P.2d 688, 695-96 (Okla. 1990).

235. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Wendt*, 708 P.2d 581 (Okla. 1985).

236. OKLA. STAT. tit. 36, § 3636(B) (Supp. 2008).

237. "The majority view . . . is that a vehicle of which either the owner or [operator] is covered by [the] minimum insurance coverage is not 'uninsured' even though one of [these individuals] has no insurance." *State Farm Mut. Auto. Ins. Co. v. Cummings*, 778 P.2d 370, 374 (Kan. Ct. App. 1989). *See also Stordahl v. Gov't Employees Ins. Co.*, 564 P.2d 63 (Alaska 1977); *Evenchik v. State Farm Ins. Co.*, 679 P.2d 99 (Ariz. Ct. App. 1984); *Gen. Accident Fire & Life Assurance Corp. v. Means*, 362 So. 2d 135 (Fla. Dist. Ct. App. 1978); *Sorbo v. Mendiola*, 361 N.W.2d 851 (Minn. 1985); *Vadnais v. State Farm Mut. Auto. Ins. Co.*, 354 N.W.2d 607 (Minn. Ct. App. 1984); *Motorists Mut. Ins. Co. v. Tomanski*, 271 N.E.2d 924 (Ohio 1971); *Fielder v. Amica Mut. Ins. Co.*, 378 A.2d 1386 (R.I. 1977).

238. *Gates v. Eller*, 22 P.3d 1215 (Okla. 2001).

- (4) He may file an action against the uninsured motorist and give no notice to the insurance company.²³⁹

If the court determines “that no prejudice will result in litigating all of the issues in one trial, the insurer is bound by the judgment as to all issues, including liability and damages under the options described in one, two and three.”²⁴⁰ Only option four permits the insurance company not to be bound by the judgment.²⁴¹ Under option two, evidence as to the names of either the tortfeasor’s liability carrier or the insured/plaintiff’s uninsured motorist carrier and the terms of the respective insurance contracts are prejudicial and should not be submitted to the jury.²⁴²

III. UNINSURED MOTORIST CARRIER’S OBLIGATIONS AND RIGHTS

Uninsured motorist carriers are not obligated to explain uninsured motorist coverage as a precondition to an effective statutory rejection.²⁴³ However, they are obligated to investigate, evaluate, negotiate, and pay an insured’s claim in a reasonable manner.²⁴⁴ Since uninsured motorist coverage is primary first-party coverage, and given the fact that the insured may sue his own insurer without first obtaining a judgment against the uninsured motorist, insurance companies cannot avoid or delay their obligation to pay by requiring the insured to exhaust all available liability insurance prior to receiving uninsured motorist benefits.²⁴⁵ Furthermore, because uninsured motorist coverage is viewed as primary first-party coverage, an uninsured motorist carrier, once its evaluation of the likely worth of the claim exceeds the tortfeasor’s

239. *Keel v. MFA Ins. Co.*, 553 P.2d 153, 158 (Okla. 1976) (citation omitted); *see also* *Daigle v. Hamilton*, 782 P.2d 1379 (Okla. 1989) (injured insured may not bring a direct action against tortfeasor’s insurer).

240. *Keel*, 553 P.2d at 159.

241. *Id.*

242. *Tidmore v. Fullman*, 646 P.2d 1278, 1283 (Okla. 1982).

243. *Silver v. Slusher*, 770 P.2d 878 (Okla. 1988).

244. *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162 (Okla. 2000); *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105 (Okla. 1991) (the investigation and evaluation must be independent—the carrier may not rely on the investigation or evaluation of the tortfeasor’s carrier); *Newport v. USAA*, 11 P.3d 190 (Okla. 2000) (lowball offers less than an insurer’s own evaluation of the claim can constitute bad faith); *Brown v. Patel*, 157 P.3d 117 (Okla. 2007).

245. *Everaard v. Hartford Accident & Indem. Co.*, 842 F.2d 1186 (10th Cir. 1988); *Barnes*, 11 P.3d 162; *Mustain v. U.S. Fid. & Guar. Co.*, 925 P.2d 533 (Okla. 1996); *Buzzard*, 824 P.2d 1105.

liability limits, is liable for the entire amount of its insured's loss from the first dollar up to the policy limits without regard to the presence of other coverage.²⁴⁶

Implicit in these obligations is the duty of good faith and fair dealing.²⁴⁷ Because the duty of good faith and fair dealing is nondelegable, insurance companies cannot avoid liability by delegating their responsibilities to independent contractors, including legal counsel.²⁴⁸ An insurer does not breach its duty of good faith by litigating a legitimate dispute with its insured.²⁴⁹ However, breach of the duty of good faith and fair dealing can occur when an insurer's litigation conduct has no legitimate or reasonable purpose.²⁵⁰

Section 3636(E) of the Oklahoma Uninsured Motorist Act provides that:

The insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.²⁵¹

Pursuant to this rule of statutory subrogation, an uninsured motorist carrier, upon payment of the claim, is entitled to subrogation from the tortfeasor.²⁵² If the injured insured affirmatively destroys the carrier's subrogation right against the wrongdoer, by settlement or release, he

246. *Burch v. Allstate Ins. Co.*, 977 P.2d 1057 (Okla. 1998) (all uninsured/underinsured motorist coverage is primary—there is no such thing as excess UM coverage in Oklahoma).

247. See cases cited *supra* note 244.

248. *Barnes*, 11 P.3d at 167 n.5.

249. *Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760 (Okla. 1984).

250. *Brown v. Patel*, 157 P.3d 117 (Okla. 2007).

251. OKLA. STAT. tit. 36, § 3636(E) (2001). Subsection (E)

creates subrogation rights to guard against one insurer shifting the burden of loss to another or escaping the burden of loss through token settlements. . . .

Under § 3636, the injured insured has a right to an indemnity unburdened by contract provisions that control priority among multiple UM insurers. . . . Payment entitles the insurer to a judicial determination of the primary, secondary, and tertiary priority among insurers pursuant to the applicable UM insurance policies.

Mustain v. U.S. Fid. & Guar. Co., 925 P.2d 533, 536 (Okla. 1996).

252. *Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302 (Okla. 1982).

forfeits his right to the uninsured motorist coverage.²⁵³ There are however, exceptions to the general rule that destruction of the insurer's subrogation right operates as a complete defense to an action on the policy. For example, where the insurer's conduct constitutes a breach of contract, waiver, or estoppel, the injured insured's destruction of the insurer's right of subrogation does not constitute a complete defense.²⁵⁴ Estoppel arises when an insurer denies the uninsured motorist claim,²⁵⁵ fails to investigate, or unjustifiably delays the negotiations or engages in conduct that causes the insured to believe benefits will not be forfeited and the insured then settles with the wrongdoer.²⁵⁶ A failure to offer uninsured motorist coverage, which leads an insured to settle with the tortfeasor believing that such coverage does not exist, constitutes a constructive denial of coverage, which also precludes the insurer from asserting destruction of its subrogation right as a defense.²⁵⁷

Section 3636(E) further provides that:

Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:

1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and
2. Written authorization or a court order to obtain reports

253. *Id.* at 305. See also *Frey v. Independence Fire & Cas. Co.*, 698 P.2d 17 (Okla. 1985) (covenant not to sue given by insured to tortfeasor operated as a complete defense to uninsured motorist claim because it destroyed insurer's subrogation right); *Burch v. Allstate Ins. Co.*, 977 P.2d 1057 (Okla. 1998).

254. *Sexton v. Cont'l Cas. Co.*, 816 P.2d 1135 (Okla. 1991).

255. *Id.* at 1138-39.

256. *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105 (Okla. 1991).

257. *Robertson v. U.S. Fid. & Guar. Co.*, 836 P.2d 1294, 1296 (Okla. 1992).

from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.²⁵⁸

Because an insured's voluntary settlement with an uninsured motorist destroys the uninsured motorist carrier's subrogation rights and operates as a forfeiture of the benefits afforded in the policy, the Oklahoma legislature, in section 3636(E)(1)–(2), created a mechanism by which an insured could receive the equivalent of a settlement offer from the tortfeasor, while at the same time protecting the underinsured motorist carrier's subrogation rights against the wrongdoer.²⁵⁹

Once notified of a tentative settlement, the uninsured motorist carrier, in order to preserve its subrogation rights, must “‘substitute its payment to the insured for the tentative settlement amount’ and ‘then [it will] be entitled to the insured’s right of recovery to the extent of such payment and any settlement under the [UIM] coverage.’”²⁶⁰ If substitute payment is not forthcoming the “‘insurer has no right to the proceeds of any settlement or judgment . . . for any amount.’”²⁶¹ The substitute payment for the tentative liability limits settlement offer is distinct from the underinsured motorist coverage.²⁶² Substitute payment “does not relieve the [underinsured motorist insurer] of its responsibility to pay to its insured the full amount of [the claim] when a reasonable evaluation of the insured’s injuries . . . equal or exceed the limits of both the tortfeasor’s liability coverage and the [underinsured motorist] coverage.”²⁶³

258. OKLA. STAT. tit. 36, § 3636(E) (2001).

259. *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162, 168 (Okla. 2000).

260. *Id.* at 173 (quoting § 3636(E)(2)) (added emphasis omitted).

261. *Id.* (quoting § 3636(E)(2)).

262. *Id.*

263. *Id.*

The express language of section 3636(E) does not preclude the recovery of underinsured motorist benefits when an insured fails to follow the precise language of the notice of settlement provision and impairs the insurer's subrogation rights. Because the rule of subrogation is not absolute, equitable principles should be used to determine whether a forfeiture of the policy proceeds would be unjust.²⁶⁴ Thus, an uninsured motorist carrier that is precluded from exercising its right to subrogation against the tortfeasor should be required to pay in the absence of proof that the insured conducted himself in a manner that manifested a knowing and affirmative awareness of the impairment of the insurer's rights resulting in actual prejudice.²⁶⁵

In *Keel v. MFA Insurance Co.*, the court recognized that an insured possessed of a claim against an uninsured motorist had four litigation options.²⁶⁶ The third option expressly allows an insurance company to intervene in the insured's action against an uninsured motorist.²⁶⁷ Intervention may be classified as either intervention of right or permissive intervention.²⁶⁸ Intervention of right is allowed:

1. When a statute confers an unconditional right to intervene;
- or,
2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and [he] is so situated that the disposition of [that] action may as a practical matter impair or impede [his] ability to protect that interest.²⁶⁹

In order to intervene as a matter of right:

- (1) the motion to intervene must be timely; (2) the intervenor must claim a significant protectable interest relating to the

264. See Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 MO. L. REV. 723 (2005).

265. See *Phillips v. N.H. Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001); *Strong v. Hanover Ins. Co.*, 106 P.3d 604 (Okla. Civ. App. 2004).

266. *Keel v. MFA Ins. Co.*, 553 P.2d 153, 158 (Okla. 1976).

267. *Id.* "(3) He may file an action against the uninsured motorist without joining the insurance company as a party defendant, but give adequate notice of the filing and pendency of such action to the insurance company so they take whatever action they desire, including intervention." *Id.*

268. OKLA. STAT. tit. 12, § 2024 (Supp. 2008).

269. § 2024(A).

property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.²⁷⁰

Generally, intervention as a matter of right should not be allowed when a party to the controversy adequately represents the interest of an intervenor.²⁷¹

In the context of an uninsured-motorist-coverage claim, the insurance company's right to subrogation is of the same nature as the insured's claim against the uninsured motorist.²⁷² Consequently, intervention as a matter of right should be denied because the objective of the insurance company seeking to intervene is identical to that of the insured.²⁷³ As explained by the court in *Brown v. Patel*,

an intervenor's interest must be "significantly protectable" or "direct, substantial, [and] legally protectable." An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule for intervention as of right.²⁷⁴

In the absence of payment an insurer has no subrogation interest—"a potential subrogation interest against an insured's alleged tortfeasor, by itself, is too remote to justify an insurer's right to intervene as a matter of right."²⁷⁵

Because the court favors intervention and joinder of parties as a convenient or pragmatic means of settling controversies relating to the same subject matter, an insurer not entitled to intervene as a matter of right may seek permissive intervention when its claim or defense and the main action have a question of law or fact in common.²⁷⁶ Permissive

270. *Brown v. Patel*, 157 P.3d 117, 124 (Okla. 2007) (these are referred to as the requirements of timeliness, interest, impairment of interest, and adequacy of representation).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 125 (footnotes omitted).

275. *Id.* (emphasis omitted).

276. *Id.* at 123–24; *Keel v. MFA Ins. Co.*, 553 P.2d 153 (Okla. 1976).

intervention may also be proper when the insurer merely desires to monitor the action.²⁷⁷ The right to intervene does not necessarily mean that the applicant will be allowed to participate in every aspect of the case.²⁷⁸ “The court can take any appropriate steps to prevent the intervenor from prejudicing the trial of the action.”²⁷⁹

IV. CONCLUSION

Uninsured motorist law is purely a creature of statute. The legislature enacted the Oklahoma Uninsured Motorist Act in response to the growing menace of uninsured drivers who left innocent, injured victims without compensation. Uninsured motorist coverage in Oklahoma serves a vital purpose—“to protect the insured from the effects of personal injury resulting from an accident with another motorist who carries no insurance or is underinsured.”²⁸⁰ The Oklahoma uninsured motorist statute is remedial in nature and mandates the inclusion of uninsured motorist coverage in motor vehicle insurance policies. Consequently, it has been liberally construed to accomplish its legislative purpose. Guided by the single, solitary purpose of uninsured motorist coverage, Oklahoma’s uninsured motorist law has developed along a consistent path with no major shifts in public policy. In keeping with the purpose and nature of the statute, the Oklahoma Supreme Court “has an avowed ‘tendency to protect the insured’s right to collect from the UM carrier.’”²⁸¹

277. *Brown*, 157 P.3d 117.

278. *Landrum v. Nat’l Union Ins. Co.*, 912 P.2d 324 (Okla. 1996).

279. *Id.* at 328 (quoting the committee comments to OKLA. STAT. tit. 12, § 2024 (1993)).

280. *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 683–84 (Okla. 1983).

281. *Phillips v. N.H. Ins. Co.*, 263 F.3d 1215, 1220 (10th Cir. 2001) (quoting *Burch v. Allstate Ins. Co.*, 977 P.2d 1057, 1061 n.14 (Okla. 1998)).

